

**THE EFFECT OF LENIENCY POLICIES AND CRIMINAL
SANCTIONS IN THE FIGHT AGAINST CARTELS:**

AN OVERVIEW OF DEVELOPING COUNTRIES

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COVER PAGE

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THE EFFECT OF LENIENCY POLICIES AND CRIMINAL SANCIONS IN THE FIGHT AGAINST CARTELS:

AN OVERVIEW OF DEVELOPING COUNTRIES

“The challenge in attacking hard-core cartels is to penetrate their cloak of secrecy. To encourage a member of a cartel to confess and implicate its co-conspirators with first-hand, direct ‘insider’ evidence about their clandestine meetings and communications, an enforcement agency may promise a smaller fine, shorter sentence, less restrictive order, or complete amnesty.”¹

ABSTRACT: Cartels are recognised by competition authorities around the world as being particularly damaging to the well-being of markets and economies, especially in developing countries and their conduct is held to be the most egregious of anti-competitive practices. The objective of this paper is to ascertain whether preventative and deterrent measures, primarily in the form of leniency policies and criminal sanctions, have been effective in the fight against cartels or whether criminal sanctions have undermined the advancements made by leniency policies. These issues will be examined by considering the success and failures of Korea, Brazil and South Africa, with particular attention being paid to the latter. It is theorised that whilst leniency policies are invaluable in detecting and deterring cartels, criminal sanctions are so to a lesser extent due to competition authorities lacking ability and as a result of resource constraints, as well as problems of overlapping jurisdiction with public prosecutors. It is concluded that were these issues to be ironed out in developing countries, leniency policies and criminal sanctions could be used together more effectively in the fight against cartels.

¹ Organisation of Economic Co-operation and Development (OECD) ‘Fighting Hard Core Cartels: Harm, Effective Sanctions and leniency Programmes’ available at www.oecd.org accessed on 30 September 2012.

I. INTRODUCTION

The damaging effects of hard core cartels have been extensively documented. When competitors agree to forego competition for collusion, consumers lose the benefits of lower prices and superior products or services. Clandestine cartel agreements are an attack on the principles of competition law and are regarded as the most egregious infringement of competition.

Cartels are defined as ‘an association of manufacturers or suppliers formed to keep the prices high’² and commonly agree on matters such as price fixing, total industry output, market share, allocation of customers or territories, bid rigging, the division of profits and so forth. They are formed with the objective of increasing members’ profits by reducing competition.³ The effects of this type of cartel conduct may result in a cartel member’s output being reduced, prices in the particular market increasing, development and innovation being stifled and new firms being prevented from entering the market, all of which is detrimental to consumer welfare, the ultimate objective of competition law.⁴

Cartels are an increasingly international phenomenon and are recognised by competition authorities around the world as being a particularly damaging form of anti-competitive practice to the well-being of markets and economies. It is thus often an integral aspect of a country’s competition laws to identify and break up cartels; a task which is seldom straightforward given the difficulties in proving the existence of cartels.⁵

South Africa enacted the Competition Act 89 of 1998⁶ (“the Act”) with the stated purpose to “promote and maintain competition”⁷. It is all very well enacting legislation to prohibit the anti-competitive practices of cartels but if cartels cannot be identified and uncovered, there is little possibility of eliminating them. Hence the Act also provides for the establishment of a Competition Commission (“the

² *Little Oxford English Dictionary* 9ed (2006) 96.

³ ‘Cartel’ *Wikipedia, the free encyclopedia* 1 June 2012 available at <http://en.wikipedia.org/wiki/Cartel>, accessed on 11 June 2013.

⁴ K Moodaliyar ‘Are Cartels Skating on Thin Ice? An Insight into the South African Corporate Leniency Policy’ (2008) 125 *SALJ* 157 at 157.

⁵ *Op cit* note 3.

⁶ Competition Act 89 of 1998.

⁷ *Ibid*, section 2.

Commission”) and a Competition Tribunal (“the Tribunal”) which have the respective powers to, *inter alia*, investigate and evaluate alleged contraventions of Chapter 2 of the Act⁸ (which sets out prohibited practices including horizontal restricted practises under section 4 which will be discussed in more detail below) and adjudicate on any conduct prohibited in terms of Chapter 2 by determining whether the prohibited conduct in question has occurred⁹. Although the Act grants the Commission extensive powers to investigate cartels,¹⁰ the reality of a developing country such as South Africa means that resources are scarce and combating cartels is often secondary to other pressing socio-economic issues. Thus, unless a complainant comes forward, the chances of identifying and proving the existence of a cartel tend to be fairly low.

Whilst numerous developed countries have had great achievements in combating cartels, few developing countries have the resources for detecting domestic and international cartels and deterring anti-competitive practices. The consequence is that developing countries either have to rely on co-operation from developed countries and/or they implement leniency programs and rely on disclosures made in terms thereof.

The purpose of a leniency program is to uncover schemes by giving firms an incentive to disclose their involvement in a cartel and to hand over evidence even prior to an investigation being carried out or, where already under investigation, to leave the cartel.¹¹ In return, the firm may be given immunity from prosecution or a reduced penalty. Such disclosures allow competition authorities to pierce the veil of secrecy and obtain insider information. This expedites the investigation and benefits both the public and the competition authorities through the saving of time, money and resources which are required for a lengthy investigation. Moreover, it has a deterrent effect on the formation and persistence of cartels as it destabilises their operations and instils mistrust and suspicion amongst the cartel members.

The Commission in its endeavours to detect, stop and prevent cartel activity has in line with other international jurisdictions developed a leniency policy to facilitate the process through which firms participating in a cartel are encouraged to

⁸ Ibid, section 21(1)(c).

⁹ Ibid, section 27(1)(c).

¹⁰ Ibid, chapter 5.

¹¹ K Moodaliyar op cit note 4 at 158.

disclose information on the cartel conduct in return for immunity from prosecution.¹² The Commission implemented the first version of its corporate leniency policy in 2004.

Although leniency policies certainly play a role in deterring cartels, they are probably more effective in identifying cartels. The question remains as to the most effective way in which to deter the formation of cartels and their related conduct. As in South Africa, cartels are prohibited in many jurisdictions because of the recognised harmful effects which they have on economies and significant penalties or fines are usually imposed with a view to deterring cartels. However the effectiveness of such penalties has been weakened, *inter alia*, by the fact that cartels have become increasingly sophisticated, operating conspiratorially and in secret so as to avoid being detected in the first place.¹³ Even where they are exposed to large fines, these fines are in some instances ineffective in deterring cartels because the impact of the fine is outweighed by the benefits or gains which cartels derive from co-operative anti-competitive practices. Accordingly, there has been a trend for countries with competition laws to introduce criminal sanctions for anti-competitive behaviour.¹⁴

South Africa followed suit and under the Competition Amendment Act¹⁵ ('the Amendment Act') introduced section 73A which makes it an offence for a person who is a director or in a management position to cause or permit the firm to engage in a prohibited practice. The threat of criminal prosecution leading to a fine or imprisonment will certainly deter many potential cartel participants from engaging in anti-competitive behaviour. However, as it stands section 73A raises many questions as to how it is to be interpreted and to its constitutionality. It also has to be considered whether a criminal sanction will not serve to detract from the efficiency of the leniency policy by deterring individuals from coming forward for fear of prosecution.

In considering the approach adopted by South Africa under its leniency policy and its decision to incorporate a criminal sanction into its competition law,

¹² Competition Commission of South Africa Corporate Leniency Policy Government Notice No 195 of 6 February 2004 para 2.5.

¹³ K Moodaliyar *op cit* note 4 at 157.

¹⁴ R Whish *Competition Law* 4ed (2001) 416.

¹⁵ Competition Amendment Act 1 of 2009.

due regard will be given to the approach taken in other developing countries. As a point of departure, Korea and Brazil will provide a comparative view in respect of the measures taken by developing countries in relation to leniency policies and criminal sanctions. The successes and pitfalls of these regimes will be discussed so as to see what South Africa can learn from their experiences and to see how its own regime may be improved.

Chapter II of this paper sketches the reason behind cartel formation and the effect that cartels have on developing countries. Chapter III outlines the theory of leniency policies. Chapter IV and V considers the success and failures of leniency policies and criminal sanctions as adopted by Korea and Brazil respectively. Chapter VI sets out South Africa's competition legislative framework for dealing with cartels; it considers the success and failures of the leniency policy and criminal sanction and also raises a number of issues unique to South Africa. Chapter VII gives a general overview of the effectiveness of imposing criminal sanctions in developing countries.

II. THE IMPACT OF CARTELS ON DEVELOPING COUNTRIES

It is often espoused that cartels are the most egregious form of anti-competitive behaviour; this is in part because the types of horizontal restrictive practices in which they engage allow a number of competitive firms to act like a monopolist.¹⁶

Although cartels are seen from the outside as being formidable, they are generally inherently nervous and unstable. Their collusion is motivated by self-interest and consequently if their own economic situation or market circumstances change so that co-operation is no longer to their advantage, the desire to co-operate will disappear – at the heart of it cartel members remain rivals.¹⁷ Cartels have accordingly been described as ‘a product of *truce* rather than...a genuine alliance’¹⁸.

Given cartels’ inherent instability, economists have employed game theory and use the ‘Prisoner’s Dilemma’ to explain the benefit/risk analysis in forming and maintaining cartels.¹⁹ The Prisoner’s Dilemma is used to illustrate that at the inception of the cartel it is a matter of working out the dynamics of competition – the effect of lowering prices, the output and price which the cartel members will charge to receive the optimal collective benefit, and an agreement not to adjust their price.²⁰ Essentially, the best strategy is for the firms to compete independently unless they are certain that the other(s) will charge the agreed price. Collusion will ensure that they gain collectively but the cartel members will only be willing to continue to do so if they are confident that the other firm(s) will adhere to the arrangement.²¹ Once the cartel is established, the over-riding concern will be whether it is in that firm’s self-interest to maintain the agreed status quo.

In many countries the operation of a cartel is illegal and firms that are found guilty of participation are severely fined, for example the United States makes provision for treble damages²². One has to wonder then whether the benefits of

¹⁶ P Sutherland & K Kemp *Competition Law of South Africa* Issue 15 (2012) para 5.2.

¹⁷ C Harding & J Joshua *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* 1ed (2003) 210.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ P Sutherland & K Kemp op cit note 16 at para 5.2.

²² M Levenstein & V Suslow ‘Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy’ (2004) 71 *Antitrust Law Journal* 801 at 801.

forming and maintaining a cartel really justify or at least outweigh the potential penalties.

In a study carried out of 69 (sixty-nine) court outcomes in 11 (eleven) jurisdictions, it was demonstrated that 71 per cent of cartel participants were aware that their actions were illegal²³ and in the vast majority of cases senior management were involved or turned a blind eye to what was happening beneath them.²⁴ The belief was that the benefits outweighed the risks associated with their illegal behaviour - 40 per cent of the cartel participants held the pressure to be profitable and for their company to perform favourably to be the main reasons for participation.²⁵ Other reasons cited for forming or joining the cartel included to build trust and working relationships, to co-ordinate an approach to serving customers, to prevent the firm being forced out of business for not joining the cartel, to counterbalance the dominance of certain firms in the market and thereby benefit the economy, to increase profits and maximise profit margins.²⁶

Of the outcomes analysed in this study 73 per cent related to domestic cartels and the remainder to international ones.²⁷ As early as the between 1929 and 1937 cartels were having an impact; it has been estimated that international cartels affected 40 per cent of all world trade in the aforesaid period.²⁸ Through globalisation and the expansion of markets international cartels have become more prevalent and have evolved and expanded. Although global economic integration has provided opportunities for developing countries to grow it has also resulted in them becoming more exposed to foreign sources of anti-competitive behaviour.²⁹ Thus regard must be given to the impact cartels have on economics and competition in developing countries which tend to be marginalised.

The effect of cartels on developing countries was put into perspective by a quantitative analysis carried out by M Levenstein and V Suslow for the period

²³23 Note that in 22 per cent of the cases analysed it could not be determined whether the participants were aware of the illegality of their actions and in 7 per cent they were unaware of the illegality.

²⁴ M Berzins & F Sofo 'Non-compliance with competition laws and offenders' reasons for forming a cartel: content analysis of court outcomes in eleven jurisdictions' (2007) 3 *Competition L. Int'l* 36 at 38.

²⁵ Ibid, 36.

²⁶ Ibid, 39-40.

²⁷ Ibid, 38.

²⁸ Ibid, 36.

²⁹ Y Yu *The Impact of Private International Cartels on Developing Countries* (unpublished Honours thesis, Stanford University, 2003) at 3.

between 1990 and 1997. Using a sample of 19 (nineteen) products they found that the total value of potentially cartel-affected imports to developing countries was \$51.1 billion. This figure represented 3.7 per cent of all imports to developing countries and 0.79 per cent of their combined GDP (gross domestic product) in 1997.³⁰ Stated differently, the average annual amount of trade impinged on in cartel-affected industries to developing countries in the same period was \$18.5 billion.³¹

They explained further that in 1997 foreign aid to developing countries amounted to \$39.4 billion, thus if the prices of the imports increased on average 10 per cent annually (10 per cent being the lowest reported increase of the samples used) producers from developed countries could potentially take 15 per cent of what their government donated in foreign aid from developing country consumers as a result of higher prices.³²

The most recognised impact that cartels have on consumers is that the price of the goods or services will increase, product choice may decrease and innovation and development is restrained. For producers there are costs and advantages associated with the existence of international cartels. A producer who is not part of the cartel may be able to sell at the cartel price whilst not being restricted by any quota and thereby benefit from cartel members' output restrictions.³³ On the other hand international cartels may adopt tactics so as to deny developing country producers access to the market. These tactics may include restricting the flow of information and limiting access to technology, using tariffs and anti-dumping duties as barriers, or even threats of retaliatory or predatory price wars, use of common sales or distribution agency and patent pooling.³⁴ Moreover, once the cartel has dissolved developing countries may be compelled to become part of a joint venture as a result of cartel-created barriers. Whilst there may be some benefits to the joint venture such as sharing of technology, market expertise or access to capital, it may also limit a developing country's sales and distribution to a particular market. Joint

³⁰ M Levenstein & V Suslow op cit note 22 at 816.

³¹ Ibid.

³² Ibid.

³³ Y Yu op cit note 29 at 7.

³⁴ M Levenstein & V Suslow op cit note 22 at 820 – 821.

ventures could also be used by colluding firms to incorporate developing countries into their cartels or to engage in an implicit co-operative pricing arrangement.³⁵

Whilst anti-competitive behaviour by cartels may impact on markets internationally, prosecution of cartels is generally handled by each country individually and in relation to the specific damage they have caused to the domestic market. The developed countries have strong competition authorities to prosecute cartels whereas few developing countries have competition authorities and even fewer are sufficiently competent or have the necessary resources.³⁶ Developing countries need to take measures so that in a cost/benefit analysis the sanctions will have a deterrent effect and outweigh the advantages. It is suggested that too often the penalties handed down to cartel members serve as ‘little more than a slap on the wrist’³⁷.

³⁵ Ibid, 824.

³⁶ Y Yu op cit note 29 at 3.

³⁷ M Berzins & F Sofo op cit note 24 at 41.

III. THE ESSENCE OF LENIENCY POLICIES

Incorporating a leniency policy into its program of cartel enforcement has been recognised by many countries as having substantial benefits. Foremost is the fact that it uncovers conspiracies which would otherwise go undetected because of the secretive nature of cartels. In addition, once an applicant for leniency has disclosed the cartel activity it is required to cease and desist from continued involvement with the cartel in order to reap the benefits of leniency. Leniency policies with high sanctions operate as a deterrent to both cartel members who fear getting caught and as an incentive to co-operate with prosecutors in order to reduce or eliminate sanctions.

Where an applicant reports cartel activities and implicates other members of the cartel it can provide competition authorities with first hand evidence which will not only speed up the investigation process but will also mean that the investigation can be carried out at a reduced cost.³⁸ In turn, this will potentially increase the prospects of a successful prosecution. These benefits can then be translated to the consumer and the community which profits from the concomitant effects of increased competition, lower prices, better services and increased innovation and efficiency in the market.³⁹

The addition of a leniency program does not necessarily translate into an effective competition regime. Developing countries in particular tend to fall short in implementing leniency policies. Developing countries will usually all encounter similar obstacles in implementing their respective leniency policies but some challenges will be unique to the specific country.

Budgetary constraints are probably the main challenge faced by competition authorities in developing countries. Governments have limited resources at their disposal and can better justify using what resources they have to deal with more

³⁸ International Competition Commission 'Anti-Cartel Enforcement Manual, Chapter 2 Drafting and implementing an effective leniency program' available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc341.pdf> accessed on 2 October 2012.

³⁹ Ibid.

pressing socio-economic problems.⁴⁰ A lack of resources will not only mean a smaller number of staff but also that they are unlikely to receive the appropriate training and skills development. The corollary of this is that they will not be able to adequately respond to queries and complaints, investigate cartels efficiently, identify anti-competitive practices or handle complex matters. These factors cause delays and incorrect decisions.⁴¹ Although it is reasoned that priority should be given to the strengthening of anti-cartel enforcement,⁴² lack of resources will make it especially difficult to effectively and efficiently investigate and prosecute cartels, especially because the larger international cartels have access to resources and the best economists and lawyers to assist them in defending any proceedings instituted against them.⁴³

A further challenge faced by these competition authorities is the absence of a competition culture.⁴⁴ A consumer's failure to understand the importance of free and fair competition and the potential harms resulting from a lack of consumer activism combined with businesses' view that competition enforcement amounts to unwarranted government intervention, will make it difficult for a competition authority to justify its relevance. Consequently, firms and individuals are less likely to see the importance in applying for leniency and disclosing cartel activities.⁴⁵ This is clearly seen from the early experience of competition law in Korea (as outlined below).

Commonly cartel activity is detected through leniency applications. Alternatively cartels may be discovered through a competition authority's own investigations or as a result of public announcements made by developed countries in the form of a press release following a dawn raid or by way of a final decision in a

⁴⁰ T Kunene 'Challenges faced by new Younger Competition agencies in the Investigation of Cartels' (2006) available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc704.pdf> accessed on 13 October 2012.

⁴¹ 'Strategic priorities of competition and regulatory agencies in developing countries' Paper submitted under first research cycle of CUTS Competition, Regulation and Development Research Forums (CDRF) available at <http://www.circ.in/pdf/STRATEGIC%20PRIORITIES%20OF%20COMPETITION%20AND%20REGULATORY%20AGENCIE.pdf> accessed on 17 October 2012.

⁴² Ibid.

⁴³ T Kunene op cit note 40.

⁴⁴ Op cit note 41.

⁴⁵ T Kunene op cit note 40.

cartel investigation.⁴⁶ Whilst these public announcements and the information and evidence collected by developed countries can be useful leads for developing countries, it often only becomes available after investigations are finalised and even then it may be limited due to reasons of confidentiality and plea bargain settlements.⁴⁷ Furthermore, the investigation of international cartels is time consuming and where a developing country has to wait for information and evidence to become available before conducting its own investigation too much time may lapse and authorities could face issues of prescription.⁴⁸ It is suggested that in these types of circumstances, developed countries should assist developing countries as their information may be invaluable to them in investigating and prosecuting cartels and save on their limited resources.

One of the problematic aspects of developing countries relying so largely on the voluntary co-operation of cartel members under a leniency program is that local branches may have little knowledge of the activities of large international cartels and are unlikely to have access to documents relating to such activities. As they are unlikely to be able to provide any meaningful information or evidence to an investigation, they will not succeed with a leniency application which will deter them from coming forward in the first place.⁴⁹

In addition to the general problems of enforcement that have been discussed above, additional challenges may arise for both applicants and competition authorities as a result of the processes required to be followed under a particular leniency policy. In this respect we shall consider the experiences of Korea, Brazil and in particular South Africa, and the strengths and weaknesses of their differing applications of leniency.

⁴⁶ Information obtained from United Nations Conference on Trade and Development 'Cross-border anticompetitive practices: The challenges for developing countries and economies in transition' 12th session, Geneva 9 – 11 July 2012.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

IV. THE KOREAN EXPERIENCE

a) Leniency

Since the 1980s when the Korean economy began to develop at a rapid pace, the fight against cartels has received greater priority. In 1981 Korea enacted the Monopoly Regulation and Fair Trade Act⁵⁰ (“MRFTA”) in its pursuit for a balanced development of the national economy. It strived to prevent abuse of market-dominance by firms and excessive concentration of economic power by regulating undue collaborative acts and unfair trade practice, and by promoting free and fair competition.⁵¹ The implementation of many of these objectives is today still overseen by the Korean Fair Trade Commission (“KFTC”).

Korea adopted a leniency program in 1997. The requirements for qualifying under the leniency policy were set out in the enforcement regulations. Although not clearly stated, it was implicit that information disclosed had to be valuable, accurate and complete; furthermore the applicant could not be the instigator of the cartel.⁵² An administrative fine and a criminal sanction could both be imposed. The sanction and degree of punishment were based on a firm’s responsibility and were determined at the discretion of the authorities.⁵³

The fact that between 1997 and 2000 there was merely one reported leniency application⁵⁴ is clearly indicative of the fact that this version of the leniency policy had several shortcomings. The regulations as well as the requirements and processes to be followed were vague and unclear, the applicant had no guarantee that its identity would remain confidential or that it would not be criminally prosecuted, and the fines (of up to 5 per cent of the firm’s annual turnover) were inadequate as a deterrent. In fact this financial sanction was less stringent than in most other countries with similar such programs.⁵⁵ As stated above, the sanctions placed on the member firms were at the discretion of the competition authorities and this wide

⁵⁰ Act No. 3320 of 1980.

⁵¹ Details of Enactment and Amendment to Act No. 3320 of 1980.

⁵² Organisation for Economic Co-operation and Development (OECD) ‘Leniency Programmes to fight hard-core cartels’ 2001(3) *Journal of Competition law and Policy* 13.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ K Moodaliyar op cit note 4 at 167.

discretion was viewed as a further weakness in the policy. It created additional uncertainty because the lack of precedent meant that firms could not know what risk they faced.⁵⁶

Where a firm was the first to present information to the KTFC about a cartel which it had previously been unaware of, the firm would be granted around 75 per cent leniency treatment, if the investigation had already commenced the first firm ‘through the door’ would be granted 50 per cent leniency. All other applicants would be granted less than 50 per cent leniency.⁵⁷ The fact that a firm could never obtain more than 75 per cent leniency treatment would hardly suffice as enough of an incentive for firms to come forward given that the advantages gained from participation in the cartel would probably outweigh the benefits of partial leniency treatment.

The limitations of the leniency program were further exacerbated by the fact that Korea had a confucian culture where co-operation amongst people was highly valued with the result that firms formed cartels without much sense of guilt and members were reluctant to betray one another.⁵⁸

In 2005, In Ok Son, General Counsel for the KFTC gave a presentation to members of the International Competition Network (‘the ICN’) whereat he discussed various factors which he believed would assist Korea, as a developing country, in clamping down on cartel activities. Two of the greatest problems which he highlighted were the gathering of electronic evidence and investigating international cartels.⁵⁹ Close co-operation and experience sharing were emphasised as key and that without co-operation investigating international cartels would be almost impossible.⁶⁰ His suggestions were, *inter alia*, the building of channels for co-operation through bilateral and multilateral agreements, forming and strengthening non-official channels with access to cartel handlers at all times, joint investigations

⁵⁶ Ibid, 167.

⁵⁷ Ibid, 167.

⁵⁸ In Ok Son ‘*KFTC’s Experience in Fight against Cartel and its Implications*’ published by the International Competition Network (ICN) available at www.internationalcompetitionnetwork.org accessed on 6 October 2012.

⁵⁹ Ibid.

⁶⁰ Ibid.

with foreign competition authorities, competition policy consultations, multilateral discussions and workshops.⁶¹

The Korean leniency policy was revised in 2000 and again in 2004/5. The latter version provides for a number of the abovementioned recommendations. The KFTC undertook various measures such as educational programs and campaigns to increase public awareness and understanding as to the harm caused by cartels and to highlight to the public that it was being directly affected by cartel extortions.⁶² The KFTC also recognised the benefit in offering leniency to second and subsequent firms which come forward and even to firms which established the cartel. Accordingly, the first firm to report a cartel prior to investigations commencing now receives full immunity, and as of November 2007 the second firm receives a 50 percent reduction in penalties (instead of 30 per cent as previously provided).⁶³ Offering an incentive to the second firm further persuades a firm to approach the competition authorities to report a cartel even where it is not certain that it will be 'first through the door'.

The revised policy also includes an additional benefit for revealing another cartel and a 'marker' system to encourage quicker action.⁶⁴ This system allows an applicant to assure itself of leniency by notifying the authorities of the cartel activity and thereby securing its place in line, until such time as it can submit all the necessary information and evidence for its leniency application.⁶⁵ After investigations have commenced however, only the first firm to apply will qualify for leniency. The policy also endeavours to protect the identity of leniency applicants.⁶⁶ The sanction on a member firm has been increased from 5 per cent to 10 per cent of its annual turnover which is more in keeping with fines imposed in other countries⁶⁷ and in repeat offences the administrative penalty can be increased up to 50 per cent.⁶⁸

⁶¹ Ibid.

⁶² Ibid.

⁶³ JS Hur & PS Rhee 'Recent Enforcement of Cartel Regulations in Korea' available at <http://www.hwawoo.co.kr/newsletter/data/081119/Recent%20Enforcement%20of%20Cartel%20Regulations%20in%20Korea.pdf> accessed on 11 July 2013.

⁶⁴ Organisation of Economic Co-operation and Development (OECD) 'Monitoring Review of Korea' (2007) 9 *Journal Competition Law and Policy* 103 at 123.

⁶⁵ Ibid.

⁶⁶ K Moodaliyar op cit note 4 at 168.

⁶⁷ In Ok Son op cit note 58.

⁶⁸ Organisation of Economic Co-operation and Development (OECD) op cit note 64 at 125.

The KFTC has also incorporated a ‘whistleblower’ aspect to the leniency program to encourage individuals to come forward and disclose cartel conduct. The informant is rewarded with a portion of the penalty charged on the firm.⁶⁹ Initially the informant reward program was not very successful because informants were wary about the negative perception resulting from reporting (which would seemingly stem from the culture of cooperation amongst Korean people), they feared retaliation if their identity was not kept confidential and the incentive to make these types of disclosures was too small to justify the risks.⁷⁰ Consequently, the KFTC usually only received about one lead per year. In 2005 a new informant reward program was introduced which provided for an increased reward for information about cartels and in terms whereof the reward would be determined with reference to the seriousness of the violation and the quality of evidence provided.⁷¹ An enforcement decree was also issued in terms of the MRFTA which guaranteed the protection of confidentiality. Furthermore, additional measures were introduced to protect the informant’s identity with the ensuing result that informants are now more willing to disclose information about cartels.⁷²

The leniency program has been refined and is more transparent and predictable. The benefits thereof can be seen by the fact that 7 (seven) leniency applications were received between 1999 and 2004 but after the changes were effected in 2005, 23 (twenty three) cases were treated with leniency between 2005 and 2007, as illustrated in the table below:⁷³

Year	1999	2000	2001	2002	2003	2004	2005	2006	2007
Cases	1	1	0	2	1	2	7	7	9
Fines (USD Million)	0.314	0.043	0	1.2	3.4	0	173.6	54.9	221.3

⁶⁹ B Kim ‘Measures to Improve Cartel Detection (Other than Leniency)’ available at <http://www.internationalcompetitionnetwork.org/library.aspx> accessed on 18 October 2012.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ JS Hur & PS Rhee op cit note 63.

In the first 6 (six) months of 2008 alone, 30 (thirty) leniency applications were filed.⁷⁴

The KFTC has improved the effectiveness of its leniency program by implementing many of the good practices recommended by the ICN such as encouraging leniency applications through education and awareness campaigns, guaranteeing the protection of identities and confidentiality, introducing a marker system, offering leniency to the second firm ‘through the door’ and increasing the administrative penalty to ensure that any benefit derived from cartelisation would be outweighed by such fine.⁷⁵

Although the KFTC must be commended for the measures it has implemented, there are still a number of factors which should be considered to further improve the effectiveness of the leniency program. In particular it is submitted that the KFTC should encourage applicants to apply for leniency in other jurisdictions where such cartel conduct has occurred. This would open the lines for increased co-operation and networking between Korea and other countries and allow for the exchange of information and evidence.

b) Criminal Sanctions

Although criminal sanctions are available under Korean competition law, including a maximum 3 (three) year imprisonment, they are rarely applied. Criminal sanctions have not been strongly enforced for various reasons, some of which are specific to Korea and its cultural and economic views but for the most part these reasons stem from the same types of difficulties faced by other developing countries in competition law enforcement.

The KFTC is an administrative body under the influences of political leadership. Thus in the 1980s and 1990s Korean competition law was intended to answer to problems such as price increases, staggered economic development, monopolies and oligopolies in the market. In particular, it focused on countering the effects of market concentration which had arisen as a result of conglomerates and

⁷⁴ Ibid.

⁷⁵ International Competition Commission op cit note 38.

regulating unfair practices between firms.⁷⁶ Preventing and deterring cartel activity was therefore not a priority. This attitude has gradually changed as new presidents have been elected and awareness has increased as to the impact of such activities on the economy.⁷⁷

As an administrative body, the KFTC is also subject to budgetary constraints. Imposing an administrative penalty is an appealing choice as a portion of the penalty imposed goes to the KFTC; the same does not apply where a fine is imposed in respect of a criminal offence.⁷⁸ Furthermore, an administrative sanction is more time efficient than the judicial process of running a criminal trial. It is thus not surprising that administrative penalties and cease and desist orders take preference over criminal sanctions⁷⁹ and that less than 5 per cent of all such cases have been referred to the public prosecutor's office for criminal prosecution.⁸⁰

Where a matter does follow the judicial process, the judges are lax in punishment and prefer to impose an administrative penalty rather than a prison sentence. Since 2000 prison sentences have been imposed in merely 6 (six) cases but in not one matter did anyone actually spend any time in jail due to these sentences being suspended or individuals being given probation.⁸¹ The reluctance in imposing criminal sanctions seems to stem partly from the fact that public prosecutors and judges fail to recognise the inherent criminality of cartels.⁸² Furthermore, the lower courts' unwillingness to impose heavy white-collar sentences and their lack of ease and familiarity with economic issues means there is little judicial precedence for handling what are often complex matters and this reinforces their decision not to impose criminal sanctions.⁸³ It is hoped that as competition issues are given more priority and come under public scrutiny more regularly, the subject will become more familiar to judges and prosecutors and judicial capacity to deal with these issues will improve. International co-operation and multilateral discussions and workshops with developed countries to train and skill judges and prosecutors in

⁷⁶ S Lee 'Using action in damages to improve criminal penalties against cartels: comparative analysis of competition law of United States and South Korea' (2007-2008) 16 *Currents Int'l Trade L.J.* 55 at 59.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid, 56.

⁸¹ Organisation of Economic Co-operation and Development (OECD) op cit note 64 at 126.

⁸² S Lee op cit note 76 at 59.

⁸³ Organisation of Economic Co-operation and Development (OECD) op cit note 64 at 126.

competition law would go a long way to improving the Korean judicial system's ability to handle competition law issues, especially those relating to the criminal conduct of cartel members.

Managing directors or executives can be held criminally responsible for violations by their firms. At present, a recommendation by the KFTC is required to initiate prosecutions. From 1981 to 2010 the KFTC handled a total of 56 527 (fifty six thousand five hundred and twenty seven) cases of which 0.9 per cent were referred to the Prosecutor's Office. However, many of these involved relatively minor offences which would not usually be referred. If the scope was limited to illegal cartel cases, the referral rate increases to 11 per cent (ie 44 out of 504 cases).⁸⁴ The KFTC's exclusive referral power has been criticised and a call has been made for it to be limited so that criminal cases can be pursued through other avenues. This would allow victims of cartel activities to file complaints directly with the Prosecutor's Office. The Minister of Justice has proposed that its prosecutors be given the power to initiate competition cases of their own accord.⁸⁵ The KFTC, on the other hand, is wary that without its economic input, competition could be impaired if prosecutors apply a purely criminal law perspective.⁸⁶ In fact, it has a relatively high percentage of criminal referrals as compared with other member countries of the Organisation for Economic Co-operation and Development ('the OECD') and if the Prosecutor's Office were to start initiating criminal proceedings against leniency applicants, it would detract from the leniency program.⁸⁷

Continued lack of public awareness as to the fact that cartel activity is a criminal offence which causes harm to the consumer, is another contributing factor to the lack of enforcement of criminal sanctions. In order to enforce criminal penalties for violations of competition law, the authorities require the public's backing as well as institutional support and expert aid.⁸⁸

⁸⁴ HE Kim 'Developments in Criminal Enforcement of Competition Law in Korea' available at <https://www.competitionpolicyinternational.com/developments-in-criminal-enforcement-of-competition-law-in-korea> accessed on 11 July 2013.

⁸⁵ Organisation of Economic Co-operation and Development (OECD) op cit note 64 at 125.

⁸⁶ Ibid.

⁸⁷ JS Hur & PS Rhee op cit note 63.

⁸⁸ S Lee op cit note 76 at 59

It has been suggested that an additional incentive of a reduced criminal penalty under the leniency program should also be offered.⁸⁹ The advantage of adopting such an approach is that cartel members may be more willing to come forward where they can be certain that the firm as well as its directors will be shown leniency and consequently there will be an increase in cartel detection. One has to wonder though whether this would serve any real purpose as the threat of criminal sanction does not seem to be taken too seriously and until the system is improved and criminal sanctions are enforced it is unlikely to have any real meaningful impact on the prevention and detection of cartels.

⁸⁹ Organisation of Economic Co-operation and Development (OECD) op cit note 64 at 124.

V. THE BRAZILIAN EXPERIENCE

a) Leniency

Brazilian Competition Law was introduced in 1994 but during the early stages the emphasis was on developing and establishing a merger review process.⁹⁰ It was only later that the enforcement of cartels became a priority.

Although the Brazilian cartel enforcement regime is still in its early stages, it is regarded by many as being revolutionary in light of the lengths it has gone to in implementing and increasing dawn raids, in respect of its investigation proceedings, in raising the amount of fines, the co-operative programs it has with international antitrust agencies and criminal authorities such as Canada, the United States, Chile, Russia and the European Union, the swift development of its leniency program and its measures in pursuing criminal prosecutions. As a result Brazil is considered to be one of the leading countries in cracking down on cartels, even amongst developed countries.⁹¹ Its commitment to curbing hardcore cartels is further evidenced by the fact that the 8th October has been declared as Anti-Cartel Enforcement Day in Brazil.⁹² In fact, the 2008 Rating Enforcement Report released by the Global Competition Review stated that Brazil has the fastest growing cartel enforcers in the world.⁹³

Article 20 of Federal Law No 8 884/1994 in Brazil prohibits cartel and antitrust violations and provides that any practice that has as its object or effect the restraint of competition will be considered anti-competitive.⁹⁴ The penalties for an antitrust violation could be set between 1 per cent and 30 per cent of a firm's pre-tax turnover in the year preceding the initiation of investigations and would not be lower

⁹⁰ B Hawk 'Annual Proceedings of the Fordham Competition Law Institute International Antitrust Law and Policy' (2011) Vol 36 at 31.

⁹¹ Ibid.

⁹² SL Afrika & AD Bachmann 'Cartel Regulation in Three Emerging BRICS Economies: Cartel and Competition Policies in South Africa, Brazil and India – A Comparative Overview' (2011) 45 Int'l Law 975 at 997.

⁹³ 'Fighting Cartels: Brazil's Leniency Program' available at <http://portal.mj.gov.br/services/DocumentManagement/FileDownload.EZTSvc.asp?DocumentID=%7B78494CC5-6E1B-4BDB-B809-2CE1399D4E2B%7D&ServiceInstUID=%7B2E2554E0-F695-4B62-A40E-4B56390F180A%7D> accessed on 12 July 2013.

⁹⁴ B Hawk op cit note 90 at 44.

than the competition advantage gained from the infringement.⁹⁵ Additional penalties which may be imposed on the firm include a limitation on participating in public bids, a restriction on receiving tax benefits or receiving public financing for up to five years and the publication of any adverse decisions in a major newspaper at the firm's expense.⁹⁶ Directors of firms whose involvement in such activities was proved could be fined 10 per cent to 50 per cent of the fine applied to the firm. The problem with these administrative penalties was that there was no fixed formula for determining same, with the result that there was a lack of certainty and consistency when sanctions were imposed.⁹⁷

The three agencies that up until 2012 were primarily concerned with cartel enforcement in Brazil were the Secretariat of Economic Law of the Ministry of Justice (the "SDE") which was the chief investigative body in dealing with anti-competitive practices and also issued non-binding rulings in respect of mergers, the Secretariat for Economic Monitoring of the Ministry of Finance (the "SEAE") which issued non-binding rulings in respect of mergers and the Brazilian competition authority (Administrative Council for Economic Defence) ("CADE") which was an administrative tribunal that provided final rulings in anti-competitive and merger cases after reviewing the SDE and SEAE's opinions.⁹⁸

Brazil adopted a leniency program in 2000 and since its implementation Brazil has taken fairly aggressive measures in detecting cartels, such as dawn raids, wiretapping, co-operative crackdown programs with other countries and the use of quantitative and economic analytical techniques.⁹⁹ The effectiveness of this program can be seen by looking at the number of leniency agreements that have been signed since its inception. Between 2003 (when the first agreement was signed) and 2006 only three agreements were signed, however in the period between 2007 and 2011, twenty agreements were signed.¹⁰⁰ What is interesting to note is that most of these

⁹⁵ SL Afrika & AD Bachmann op cit note 92 at 999.

⁹⁶ MT de Araujo and AP Martinez 'Brazil's Anti-Cartel Enforcement: Preparing for the Future' (2011) 7 *Competition L. Int'l* 50 51.

⁹⁷ B Hawk op cit note 90 at 45.

⁹⁸ Under the new Brazilian Competition Act - Law 12.529/2011 CADE will have a Tribunal formed by one President and 6 commissioners, an Economic Studies Department and a General Officer. The Ministries of Finance and Justice will no longer be required to issue mandatory reports on matters falling within CADE's jurisdiction.

⁹⁹ M Calliari and DA Guimarães 'Brazilian Cartel Enforcement: From Revolution to the Challenges of Consolidation' (2010 – 2011) 25 *Antitrust* 67 at 68.

¹⁰⁰ MT de Araujo and AP Martinez op cit note 96 at 51.

agreements relate to international cartels¹⁰¹ which shows the benefits of increased recognition by and co-operation with foreign antitrust authorities.

In terms of the leniency program only the firm 'first through the door' would benefit. It must not have instigated the anti-competitive conduct, it must confess its involvement, cease its participation in such activity and co-operate fully with the investigation.¹⁰² The SDE would however only enter into a leniency agreement with a firm if it could provide sufficient information for the SDE to conduct investigations and convict the remaining cartel members.¹⁰³

Where the SDE entered into a leniency agreement, the applicant could potentially receive a reduction of one to two thirds of the financial penalty where the SDE was already aware of the cartel activity and would receive full immunity where the SDE had no prior knowledge.¹⁰⁴ In addition, the SDE would make efforts to ensure that the applicant was not subjected to criminal prosecutions for its involvement.¹⁰⁵

With a view to encouraging leniency applications, the marker system was introduced in Brazil. Applicants could thus secure their place in line in terms of a leniency application whilst still having time to collect the necessary information and evidence (provided that this was done within 30 (thirty) days).¹⁰⁶

Although, it was the SDE that entered into the leniency agreement with an applicant, the sanction imposed had to be confirmed by the CADE. Conclusion of the agreement was not subject to CADE's approval *per se*, rather when reviewing the case CADE had to consider whether there had been compliance with the agreement, and if it had been dishonoured, the benefits would be forfeited.¹⁰⁷

Brazil's achievements with its leniency program are further evidenced by the fact that international cartels are applying for leniency under Brazil's leniency program which has in turn further improved co-operation with foreign anti-trust agencies.¹⁰⁸ In 2009, Brazil joined the United States and the European Commission

¹⁰¹ M Calliari and DA op cit note 99 at 69.

¹⁰² B Hawk op cit note 90 at 51.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid, 52.

¹⁰⁸ MT de Araujo and AP Martinez op cit note 96 at 51.

in its first joint dawn raid to collect evidence on an international cartel.¹⁰⁹ Brazil's cartel-enforcement regime is clearly being seen as a force to be reckoned with and instead of receiving assistance in the enforcement of anti-competitive practices it is now in a position to provide assistance to other developing countries.

With the increasing number of successful detections and prosecutions of cartels, as well as the fact that only the first applicant could obtain immunity, the Brazilian authorities were pressed to allow for a sort of 'plea bargaining'.¹¹⁰ The idea is that firms or individuals can reach settlement with the authorities whereby they confess to their involvement, agree to desist from such activities and pay a settlement fine and the investigation is then dismissed. The benefit to the firm is clear, but there is also a benefit to the authorities in that it will have the co-operation of the firm going forwards, the anti-competitive practice will cease and less time and resources will be spent on an investigation.¹¹¹

Whilst a settlement agreement seems to be a viable option that other developing countries should consider there have also been difficulties with the concept. For example, it was initially questioned whether such a settlement agreement concluded by SDE was legitimate as only CADE had the power to do so in terms of the law.¹¹² This position was clarified by CADE which stated that it had the exclusive power to enter settlement agreements but that SDE could make suggestions and provide opinions.¹¹³ It was also unclear whether such an agreement required an acknowledgment by the firm of the unlawfulness of the conduct in question. Accordingly, CADE issued a regulation which provided that such an acknowledgement was required where the investigation was initiated in terms of a leniency agreement – this requirement was aimed at preventing settlements from jeopardising Brazil's leniency policy.¹¹⁴ If entering into a settlement were less burdensome than applying for leniency, there would be no incentive to do so and preserving the leniency policy is crucial for a sound anti-cartel enforcement program. A further issue which required clarification was the calculation of the amount to be paid in settlement. As there was no formula for calculating administrative fines, it

¹⁰⁹ Ibid.

¹¹⁰ B Hawk op cit note 90 at 55.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid, 56.

was difficult to determine what would be a reasonable amount for purposes of settlement.¹¹⁵

The strides which Brazil has made in cartel enforcement illustrate what can be achieved in a developing country if the right measures are implemented effectively; other developing countries would do well to consider some of these measures.

b) Criminal Sanctions

Brazil's good reputation is not only as a result of its leniency program, it also has one of the most active and successful programs for the criminal prosecution of cartels to date. According to Federal Law No. 8, 137/1990 criminal penalties could be imposed on individuals for cartel violations. Criminal investigations and proceedings were held to be independent of the administrative proceedings in relation to cartel enforcement although they could be run in joint or related proceedings. The criminal penalty for cartel enforcement was imprisonment of two to five years or a fine.¹¹⁶ Up until 2007 no jail sentences were imposed, however between 2007 and 2010, twenty-one jail sentences were handed down¹¹⁷ and by July 2012 more than 250 (two hundred and fifty) executives had faced criminal actions for cartelisation and 34 (thirty four) had received jail sentences.¹¹⁸

Some of the SDE's most visible results can be seen from its partnership agreements with the Public Prosecutions Office. These co-operation agreements have been beneficial because whilst the Brazilian government is willing to invest resources in cartel enforcement it does not have access to the same extent of resources that the public prosecutors do.¹¹⁹ However, the public prosecutors have their hands full with non-competition criminal and civil matters and thus their readiness to enforce competition law largely depends on the relationship which SDE

¹¹⁵ Ibid, 57. These difficulties will in all likelihood fall away with the introduction of Brazil's new competition law.

¹¹⁶ Ibid, 59.

¹¹⁷ M Calliari and DA Guimarães op cit note 99 at 67.

¹¹⁸ B Peixoto 'Brazil: Cartels & Leniency' available at <http://globalcompetitionreview.com/reviews/46/sections/158/chapters1809/> accessed on 13 July 2013.

¹¹⁹ M Calliari and DA Guimarães op cit note 99 at 68.

maintained with them.¹²⁰ Although there is an increased scope for criminal cartel enforcement by virtue of the fact that a prosecutor can initiate investigations independently of the SDE and without specialised antitrust authority to assist with investigations, this could possibly lead to differing outcomes or inappropriate sanctions.¹²¹

In October 2009, the Anti-Cartel Enforcement National Strategy (“ENACC”) was created to support the decentralisation of the fight against cartels throughout Brazil through the Public Prosecutor’s Office. It is aimed at improving the skills and expertise of public prosecutors in dealing with cartel cases and deterring cartels more effectively through increased conviction rates and by imposing more severe penalties.¹²² ENACC has also had various spin-off benefits. It has strengthened the independence of the public prosecutors thereby making it easier for them to fight cartel members who have strong links to people with political and economic influence.¹²³ Public prosecutors also have experience in combating and prosecuting people involved in corruption and other white collar crimes which are similar in procedural and discovery aspects to cartels.¹²⁴

Recently the SDE investigated foreign individuals in the course of its administrative proceedings and there is the likelihood that criminal authorities will follow suit.¹²⁵ As international co-operation becomes more prevalent there is the concern that foreign citizens living or working in Brazil will be extradited where criminal sanctions are imposed abroad on international cartels but that the same will not apply where the individual is a Brazilian citizen.¹²⁶ In fact there have already been instances where, in terms of criminal settlements executed in Brazil, foreign executives have to report to Brazilian embassies on a regular basis as part of their obligations. In addition, Brazilian authorities are also considering the idea of making use of Interpol’s Red Notice System to ensure that individuals abroad who are

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid, 69.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ B Hawk op cit note 90 at 59.

¹²⁶ Ibid.

implicated in cartel activity which has an effect in Brazil will face the imposed sanctions.¹²⁷

Whilst it is evident that Brazil has had significant achievements stemming from its enforcement of cartel activity, largely due to the successes of the leniency program and the co-operation agreements with public prosecutors and foreign anti-trust agencies, these achievements will only be sustainable with continued access to appropriate and adequate resources.¹²⁸ The challenges which Brazil faces in this regard include a shortage of staff that are equipped to deal with such matters, the strict legal demands of administrative proceedings resulting in substantial costs, the fact that cartel matters tend to involve complex new legal issues which have not yet been addressed or decided on and that parties are willing to challenge every court decision until all appeal avenues have been exhausted causing further delays and increased costs.¹²⁹ The latter of these problems will continue until such time as the highest courts hand down decisions or give further guidance in these matters.

c) New Measures Adopted

A new Brazilian Competition Act, law 12.529/2011, came into effect on 29 May 2012 and has made various changes to the rules on investigating anticompetitive behaviour. The most relevant changes in respect of cartels are briefly set out below.

The three antitrust enforcement agencies SDE, SEAE and CADE have been unified into a single agency, the new CADE. This institutional unification is expected to enhance efficiency and eliminate the overlap of functions.¹³⁰ In addition 200 permanent staff positions have been created within CADE as a step to countering the shortages of staff and untrained personnel.¹³¹

Notably, one of the reliefs introduced by the new legislation is the reduction of corporate fines. Fines will now be based on the gross sales in the relevant market

¹²⁷ MT de Araujo and AP Martinez op cit note 96 at 53.

¹²⁸ M Calliari and DA Guimarães op cit note 99 at 70.

¹²⁹ Ibid.

¹³⁰ K Katona and DH Moraes 'Reforms Achieved, But Challenges Ahead: Brazil's New Competition Law' available at <http://www.ftc.gov/oia/speeches/2011katona-brazil.pdf> accessed on 9 October 2012.

¹³¹ Ibid.

under investigation in the fiscal year preceding the commencement of proceedings. Fines will range from 0.1 per cent to 20 per cent of the firm's income from that line of business.¹³² Although it may seem counter-productive to reduce the fines, the new standard will allow CADE to better calculate fines and reduce some of the uncertainty linked to the imposition of fines. Directors of such firms may be subjected to fines ranging from 1 per cent to 20 per cent of the fine imposed on the firm.¹³³ Although the maximum term of imprisonment remains at two to five years, offenders will now be subjected to both fines and imprisonment.¹³⁴ Moreover, the new law has provided for other alternative penalties for individuals including barring the person from trading in his own name or as a representative of a legal entity for up to 5 (five) years.¹³⁵

In addition, new rules have been established in respect of the leniency program. It has done away with the rule that leniency will not be available to the instigators or leaders of a cartel and although leniency is still restricted to the first firm 'first through the door', it is no longer restricted to the first individual provided that subsequent applicants comply with all the requirements.¹³⁶ Criminal immunity that is available under a leniency application has been extended and shall apply to co-related crimes such as fraud in public procurement.¹³⁷ These new incentives for whistle-blowers are likely to increase the number of leniency agreements concluded in the future.

The new legislation is considered to be an improvement on the previous law which will boost antitrust enforcement in Brazil. CADE has been structured to work more efficiently and although fines have been reduced it is reasoned that the legislation provides greater clarity, more leniency agreements will be signed and

¹³² MC Andrade and P Vicentini 'Antitrust investigations under the Brazilian new competition law' available at <http://info.mlex.com/media/5939/46%20abex%20mmk%20eur.pdf> accessed on 17 October 2012.

¹³³ T Rhodes and P Warne 'Brazil: The New Brazilian Competition Act' available at <http://www.mondaq.com/x/166010/Antitrust+Competition/The+New+Brazilian+Competition+Act> accessed on 9 October 2012.

¹³⁴ K Katona and DH Moraes op cit note 130.

¹³⁵ B Rosenberg, JC da Matta Bernardo & C Paoletti 'The Enactment of the New Brazilian Competition Law: An Important Shift' available at www.acc.com/legalresources/publications/accdocket/upload/LAB2-Rosenberg.pdf accessed on 13 July 2013.

¹³⁶ MC Andrade and P Vicentini op cit note 132.

¹³⁷ K Katona and DH Moraes op cit note 130.

more individuals will receive jail sentences for anticompetitive practices with the concomitant result that detection and prevention of cartels is likely to increase.

On 14 December 2012, CADE proposed a new regulation to improve settlement procedures for companies involved in cartel activities but which fail to qualify for amnesty. The objective is to make self-reporting and co-operation with the government more attractive thereby improving transparency and predictability and potentially reducing the time it takes for CADE to investigate cartels.¹³⁸

In terms of the aforementioned regulation, a second applicant for leniency will receive a reduced fine of between 30 per cent and 50 per cent. The third applicant's fine will be reduced between 25 per cent and 40 per cent and any subsequent applicant who applies prior to the close of the investigation will receive a reduced fine of up to 25 per cent. If the investigation has already been completed and the matter is pending before the Tribunal, an applicant that comes forward at that stage will be entitled to 15 per cent off the estimated fine. The actual reduction will be determined by CADE based on the extent of the applicant's co-operation and the extent to which it assisted CADE's case.¹³⁹ This regulation will increase the incentive for a company under investigation to settle and to anticipate the value of its co-operation.

¹³⁸ Latham & Watkins 'Brazil Proposes New Regulation to Boost Cartel Enforcement' available at www.lw.com/thoughtLeadership/proposed-cartel-enforcement-regulations-brazil accessed on 13 July 2013.

¹³⁹ Latham & Watkins op cit note 138.

VI. THE SOUTH AFRICAN EXPERIENCE

a) The Legislative Framework

The Chapter 2 of the Act deals with two types of restrictive practices, namely vertical and horizontal restrictive practices. Vertical relationships are those between a firm, its suppliers, its customers or both¹⁴⁰ and where the parties provide complementary products or services. In other words, vertical restrictions operate between firms or individuals at different levels on the distribution chain.¹⁴¹ Co-operation is usually necessary for the relationship to be efficient with the result that it is less likely to reduce competition.¹⁴² Horizontal relationships, on the other hand, are those between competitors¹⁴³ who produce substitute products or services.¹⁴⁴ It is necessary that firms which produce or offer the same or similar goods or services compete and hence where there is co-operation between them it is inherently suspicious.¹⁴⁵

Section 4(1) of the Act is of particular relevance as cartel activities fall within the scope of restricted horizontal practices. Section 4(1) provides as follows:

‘4. Restrictive horizontal practices prohibited

1. An *agreement* between, or *concerted practice* by, firms, or a decision by an association of firms, is prohibited if-
 - a) it is between parties in a horizontal relationship and it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive, gain resulting from it outweighs that effect; or
 - b) it involves any of the following *restrictive horizontal practices*:
 - i. directly or indirectly fixing a purchase or selling price or any other trading condition;

¹⁴⁰ Act 89 of 1998, section 1(1).

¹⁴¹ P Sutherland & K Kemp op cit note 16 at para 6.5.

¹⁴² Ibid, para 5.3.

¹⁴³ Act 89 of 1998, section 1(1).

¹⁴⁴ P Sutherland & K op cit note 16 at para 5.3.

¹⁴⁵ Ibid, para 5.2.

- ii. dividing markets by allocating customers, suppliers, territories, or specific types of *goods or services*; or
- iii. collusive tendering.’

It is apparent from the above that some practices are prohibited either by virtue of their very nature or because of the relationship between the parties.

In terms of section 4(1)(a) an agreement, concerted practice or a decision will be prohibited where it has an anti-competitive effect, subject to the so-called ‘rule of reason’ justification (ie it will be prohibited unless it has any technological, efficiency or pro-competitive gain that outweighs the effect).¹⁴⁶

The section 1(1) definition of an agreement includes ‘a contract, arrangement or understanding, whether or not legally enforceable’. This definition takes cognisance of the fact that cartel agreements are generally not legally enforceable, let alone reduced to writing.¹⁴⁷ Obviously, cartels will attempt to obscure their activities and accordingly it may not be possible for the competition authorities to uncover documentary proof of agreements or decisions. The inclusion of concerted practice thus allows the authorities to take action where, objectively, the activity appears to be the intentional result of a co-operative effort.¹⁴⁸ However, the competition authorities must be mindful of not taking action in cases of parallel conduct which occurs where one firm sets the standard, for example, it raises prices and others follow suit – competition law is not aimed at prohibiting innocent conduct.¹⁴⁹

Firms often come together to form an association to protect their mutual interests and these associations can have pro-competitive effects. Problems arise though when the association imposes its decisions on its members who consider themselves bound to comply therewith.¹⁵⁰ Although the decision may only amount to a recommendation and not be legally binding, insofar as the members are inclined to implement the decision, it is likely that it will fall within the meaning of a decision.¹⁵¹

¹⁴⁶ M Brassey SC, J Campbell, R Leght et AL *Competition Law* 1ed (2002) at 139.

¹⁴⁷ P Sutherland & K Kemp op cit note 16 at para 5.4.1.

¹⁴⁸ M Brassey SC, J Campbell, R Leght et AL op cit note 146 at 133.

¹⁴⁹ Ibid.

¹⁵⁰ P Sutherland & K Kemp op cit note 16 at para 5.4.2.

¹⁵¹ Ibid.

It would appear from the structure of the Act that section 4(1)(a) is the primary prohibition¹⁵² but given how widely it has been phrased it is realised that it is actually secondary to section 4(1)(b) and functions as a catch-all provision for cartel-type activities.

Section 4(1)(b) imposes a '*per se*' prohibition on certain types of conduct. It is irrelevant whether the conduct results in anti-competitive effects or can be justified.¹⁵³ The *per se* prohibitions cover most restricted horizontal practices and are primarily aimed at deterring and eliminating cartel activity. Accordingly, the ensuing discussions on cartels in South Africa, will focus on anti-competitive behaviour in terms of section 4(1)(b).

Section 4(1)(b)(i) prohibits price fixing which is viewed as the most intolerable anti-competitive practice and often arises from the need to counter market instability or prevent competing companies from failing. It usually requires implementation by the majority of the competing firms in order to be effective and applies to the setting of minimum or maximum prices.¹⁵⁴ It has been held that conduct should only be regarded as price fixing where there is a clear link between the determination of the prices and co-operation of the firms. The reference to indirect price fixing is aimed at preventing prices being controlled through conduct such as restricting output, supply and production quantities; although it may cause some uncertainty,¹⁵⁵ the distinction between direct and indirect price fixing is largely immaterial as both are prohibited¹⁵⁶.

The section 4(1)(b)(ii) prohibition on allocating markets includes allocating customers or suppliers, dividing territories, or allocating particular types of products where there is some differentiation. By allocating markets firms can ensure the absence of other competitors and charge higher prices. It may also be easier to obtain market power through market allocation as it is easier to identify cheating by other cartel members in these situations than in cases of price fixing.¹⁵⁷

¹⁵² M Brassey SC, J Campbell, R Leght et AL op cit note 146 at 140.

¹⁵³ M Brassey SC, J Campbell, R Leght et AL op cit note 146 at 139 – 140.

¹⁵⁴ P Sutherland & K Kemp op cit note 16 at para 5.7.1.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid, para 5.7.2.

Section 4(1)(b)(iii) prohibits collusive tendering which occurs where tenderers decide amongst themselves which of them should submit the lowest and therefore winning bid. This may be in respect of a government or private tender for goods or services. In doing so, cartel members ensure that they each obtain a share of the market and that prices remain unrealistically high.¹⁵⁸ In essence it is a way of allocating markets and fixing prices.

It has been held to be irrelevant whether conduct falling under section 4(1)(b) results in anti-competitive effects or can be justified.¹⁵⁹ These types of agreements or practices are viewed as so egregious and without any evident benefit that they are presumed illegal and unreasonable without the need for any extensive inquiry into the harm caused or the reason behind them.¹⁶⁰ The incorporation of a *per se* prohibition makes economic sense as it eliminates the need for prolonged and complex investigations into whether conduct was unreasonable.¹⁶¹ However, the case of *ANSAC & Another v Competition Commission of South Africa & Others*¹⁶² has raised some complexities in respect of the *per se* prohibition.

ANSAC is a corporation of 5 (five) soda ash producers in the United States who export the product. In the United States a corporation such as ANSAC would be illegal however they were granted an exemption which allowed them to fix soda ash prices when exporting the product. Botash (the Second Respondent in the matter) filed a complaint alleging that ANSAC was, *inter alia*, fixing prices and dividing markets in contravention of section 4(1)(b)(i) and (ii). One of the pertinent issues was whether ANSAC's agreement constituted price fixing as prohibited by the Act.¹⁶³ Whilst the Supreme Court of Appeal ('the SCA') upheld the view that section 4(1)(b) was distinct from subsection (a) in that it did not allow for a rule of reason approach or an efficacy defence¹⁶⁴, it espoused the view that not all agreements by firms which set a uniform price have a chilling effect on competition and therefore

¹⁵⁸ M Brassey SC, J Campbell, R Leght et AL op cit note 146 at 142.

¹⁵⁹ Ibid, 139 – 140.

¹⁶⁰ K Moodaliya & K Weeks 'Characterising Price Fixing: A Journey through the Looking Glass with ANSAC' (2008) 11 *SAJEMS* 337 at 340.

¹⁶¹ K Moodaliya & K Weeks op cit note 160 at 345.

¹⁶² [2005] 1 CPLR 1 (SCA).

¹⁶³ Ibid – see Editor's summary.

¹⁶⁴ Ibid, para 37.

introduced the American concept of ‘characterising’ to determine whether the conduct in question constituted price fixing¹⁶⁵.

A joint venture was the example given by the SCA of an arrangement where uniform prices may be set but which has a legitimate purpose.¹⁶⁶ Joint ventures are established for efficacy reasons such as to allow firms to produce or supply products at a lower cost or to enable them to distribute a product which they could not do individually; however it is submitted that even with this aim it may be that the joint venture nevertheless lessens competition between the partners.¹⁶⁷ In setting out this example it has been suggested that the SCA was alluding to the distinction between a naked restraint which has the expected effect of increasing prices and decreasing output and an ancillary restraint which has the likely effect of lowering prices and increasing outputs.¹⁶⁸ The former is deemed *per se* illegal whereas the latter requires a further inquiry under the rule of reason to determine whether the price fixing is reasonable.¹⁶⁹ In this context characterisation also makes economic sense.¹⁷⁰

It would appear that the formulation of section 4(1)(b) does not bar characterisation of cartel-type conduct provided that the approach adopted does not blur the line between *per se* and rule of reason.¹⁷¹ The question, of course, is what is the appropriate method of characterisation? Various proposals have been made as to methods of characterisation, for example the application of decision theoretic principles which it is argued, would allow the court sufficient discretion to limit information gathering and processing so as to preserve the robustness of the *per se* norm in deterring cartel activities.¹⁷² An alternative suggestion has been that parties who contend that they are setting uniform prices for legitimate purposes should seek an exemption from the Act from the Commission.¹⁷³

As a result of this decision by the SCA, guidance and clarification needs to be given on how to approach the application of section 4(1)(b). It has lead to ambiguity

¹⁶⁵ Ibid, para 44.

¹⁶⁶ Ibid, para 54.

¹⁶⁷ K Moodaliya & K Weeks op cit note 160 at 338.

¹⁶⁸ K Moodaliyar ‘The Impact of the ANSAC Judgments on Competition Analysis’ (2006) 18 SA *Merc LJ* 367 at 373.

¹⁶⁹ Ibid.

¹⁷⁰ K Moodaliya & K Weeks op cit note 160 at 345.

¹⁷¹ Ibid, 351.

¹⁷² Ibid, 350.

¹⁷³ K Moodaliyar op cit note 168 at 375.

as to what is required to prove a restricted horizontal practice under section 4(1)(b) and how to go about characterising conduct. The matter has been referred back to the Tribunal for determination but until such time as these uncertainties have been cleared it seems likely that it will impede on the measures taken to combat cartels and their anti-competitive behaviour.

b) Leniency

It is trite that where competitors in the same market collude to set prices or terms of trade, divide or allocate markets, fix tenders or engage in other similar conduct, they are the most egregious and often the most difficult types of anti-competitive practices to detect, prove and to put an end to.¹⁷⁴ These difficulties arise partly because successful cartels are committed to keeping their agreements and decisions secret. Therefore, in a number of jurisdictions, competition authorities have responded to cartel conduct by introducing policies that offer cartel members some level of immunity or leniency where they break ranks and disclose the existence and nature of the cartel and provide the authorities with evidence of the prohibited conduct so that they can conduct investigations and where appropriate bring the cartel participants before the appropriate court.¹⁷⁵

The Commission which was established under the Act to, *inter alia*, investigate, control and evaluate restrictive practices,¹⁷⁶ has, in line with other jurisdictions, developed a corporate leniency policy in terms whereof a self-confessing cartel member who discloses information about the cartel to the Commission may in return be granted immunity from prosecution or a reduction in any administrative penalty imposed where it does not qualify for immunity.¹⁷⁷ The primary purpose of the policy is to prevent cartels from engaging in cartel-related activities which are *per se* prohibited in terms of section 4(1)(b) of the Act. However, having regard to the ordinary meaning of ‘cartel’ and the justifications for the policy

¹⁷⁴ *Agri Wire (Pty) Ltd v The Competition Commissioner* [2012] 4 All SA 365 (SCA) at para 1.

¹⁷⁵ *Agri Wire (Pty) Ltd v The Competition Commissioner* [2011] 1 CPLR 175 (CT) at para 4.

¹⁷⁶ Act 89 of 1998, header to the preamble.

¹⁷⁷ Corporate Leniency Policy 2004.

it seems possible that other horizontal anti-competitive behaviour under section 4(1)(a) could also fall within its ambit.¹⁷⁸

The Commission published the first version of its Corporate Leniency Policy in terms of Notice 195 of 2004 ('the 2004 CLP'). The 2004 CLP set out the procedure to grant immunity to the cartel participant 'first to the door'¹⁷⁹ and a successful applicant was thereby able to avoid prosecution under the Act as well as escape the imposition of any administrative penalty.

However, the 2004 CLP did not enjoy much success – by 2007 the Commission had only received 14 applications for leniency.¹⁸⁰ A review of the 2004 CLP highlighted, *inter alia*, the following concerns:-

- It was purely aimed as a guideline and was not binding on the competition authorities;
- An applicant was not guaranteed immunity as the Commission retained a discretion in this regard even where the applicant had fully complied with all conditions and requirements under the 2004 CLP;
- Applicants were obliged to make written, and not oral, applications for leniency;
- Immunity would not be granted where the applicant had been the instigator or leader of the cartel;
- A marker-type system was required so that a firm could reserve its place in line whilst collating the necessary evidence in support of its application;
- It was not clear who the contact person at the Commission was for purposes of submitting a leniency application or other queries.¹⁸¹

In order to address the above concerns the Commission amended the 2004 CLP and on 23 May 2008, the revised Corporate Leniency Policy was published under Government Notice No. 628 of 2008 ('the CLP'). The CLP applies to cartels which operate within and outside of South Africa, provided that the activity has an effect in South Africa.¹⁸² The Commission's stated purpose of the CLP is 'to

¹⁷⁸ P Sutherland & K Kemp op cit note 16 at 5-82(6).

¹⁷⁹ Corporate Leniency Policy 2004, para 5.6

¹⁸⁰ O Pillay 'Limiting collateral damage' (2009) 9 *Without Prejudice* 45 at 45.

¹⁸¹ O Pillay op cit note 180 at 45.

¹⁸² Competition Commission of South Africa Corporate Leniency Policy GN 628 of 23 May 2008 at para 5.2.

facilitate the process through which firms participating in cartels are encouraged to disclose information on the cartel conduct in return for immunity from prosecution'¹⁸³. It states further that it adopted the CLP as part of its endeavours to detect, stop and prevent cartel behaviour.¹⁸⁴

i) The CLP Process

The CLP sets out an extensive procedure to be followed in applying for immunity. However, it states that the Commission may exercise some flexibility where necessary to achieve the desired outcome. For instance, the Commission need not in each instance have a formal meeting with the applicant but may choose to communicate in some other manner.¹⁸⁵

The application must be made in writing to the Commission and must contain sufficient information for the Commission to identify the cartel conduct in question and to ascertain whether an application for immunity has already been made in respect of that cartel.¹⁸⁶ The Commission will within 5 (five) days or a reasonable period advise the applicant whether an application has already been made and if not, it must make an arrangement for the first meeting to be held between it and the applicant.¹⁸⁷ The purpose of this first meeting is to determine whether the applicant's case qualifies for immunity. At this stage the applicant is required to disclose its identity and give the Commission sight of the relevant information, evidence and documents. Within 5 (five) days of the meeting, the Commission must inform the applicant whether it meets the conditions and requirements for immunity;¹⁸⁸ if it does not, it will of course receive no immunity.¹⁸⁹

Only a firm which is 'first to the door' in disclosing cartel activity may be granted immunity under the CLP.¹⁹⁰ Where other firms wish to apply for leniency the Commission may consider other possibilities such as recommending to the Tribunal

¹⁸³ Ibid, para 2.5.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid, para 11.1.

¹⁸⁶ Ibid, para 11.1.1.1.

¹⁸⁷ Ibid, para 11.1.1.2-3.

¹⁸⁸ Ibid, para 11.1.2.

¹⁸⁹ Ibid, para 11.1.2.4.

¹⁹⁰ Ibid, para 5.6.

that the firm be subjected to a lesser penalty such as a reduced administrative fine, or that it sign a settlement agreement or consent order.¹⁹¹ An admission by a second firm and the information which it provides to corroborate what has been discovered may be particularly pertinent and valuable in cases where there is little other documentary evidence available. The Commission is generally more inclined to grant leniency rather than deny it to parties who co-operate especially where they can provide substantial new and relevant information, going even beyond what the original applicant provided. This lenient type of attitude was adopted towards *Tiger Consumer Brands Ltd* in the *Competition Commission v Tiger Consumer Brands Ltd*¹⁹² case, where the penalty imposed was mitigated by the firm's efforts to conduct internal investigations to uncover conduct within their business in respect of which it furnished the Commission with an investigation report and its co-operation with the Commission.¹⁹³

A leniency application may be brought by a firm - this includes a natural or juristic person, trust or partnership. However the person bringing the application must be authorised to act for the firm. Where such a person is not authorised it will not count as an application for leniency but will be seen as whistle blowing.¹⁹⁴

Notwithstanding that the CLP details where it is applicable, where it does not apply, that immunity will be granted only if all conditions and requirements are complied with and that the policy is aimed at certain circumstances; it is not entirely certain whether all of these provisions must be strictly adhered to in order for an applicant to successfully acquire immunity or whether they are flexible guidelines to be applied on a case by case basis.¹⁹⁵

The idea is that a firm should approach the Commission of its own accord where it is involved or implicated in cartel activity, rather than waiting for the Commission to uncover it.¹⁹⁶ As the CLP is aimed at the detection and investigation of cartels the CLP envisages that such activity should be unknown to the Commission prior to disclosure. In essence, it is aimed at cartel activity:-

¹⁹¹ Ibid.

¹⁹² 1 CPLR 71 (CT). See the discussion below under Criminal Sanctions.

¹⁹³ Ibid, para 4 & 6.

¹⁹⁴ Corporate Leniency Policy 2008 at para 5.7 – 5.6.

¹⁹⁵ P Sutherland & K Kemp op cit note 16 at 5-82(12).

¹⁹⁶ Corporate Leniency Policy 2008 at para 3.5.

- a) Which the Commission is not aware of; or
- b) Which the Commission is aware of but in respect of which it has inadequate information and no investigation has yet been initiated; or
- c) In respect of pending investigations or those already initiated by the Commission but which the Commission is of the view that it has insufficient evidence to prosecute the firms involved in the cartel activity.¹⁹⁷

Where a firm is not sure whether the CLP would apply to a particular conduct it may approach the Commission on a hypothetical basis for a non-binding opinion to get clarification. This may be done telephonically or in writing.¹⁹⁸ If the firm reveals its identity at this stage it will not be protected as immunity under the CLP has not yet been granted,¹⁹⁹ thus a firm would probably choose to remain anonymous at this point.

Information submitted by an applicant during the process is treated with the utmost confidentiality and the disclosure of any information prior to the grant of leniency is only be made with the applicant's consent, provided that such consent is not unreasonably withheld.²⁰⁰

It is apparent that the Commission does not have discretion to refuse leniency on the grounds that it could obtain the necessary information and evidence on its own accord.²⁰¹ In addition, immunity is not conditional on the proceedings against the other cartel members being successful, provided that the unsuccessful outcome is not as a consequence of the applicant's failure to co-operate.²⁰²

Once it has been decided that the applicant qualifies for immunity, a second meeting will be arranged. The reason for the second meeting is for the applicant to furnish the Commission with further information, evidence and documents and for the Commission to grant conditional immunity.²⁰³

¹⁹⁷ Ibid, para 5.5.

¹⁹⁸ Ibid, para 8.1.

¹⁹⁹ Ibid, para 8.1 – 8.2.

²⁰⁰ Ibid, para 6.2 read with para 8.2.

²⁰¹ P Sutherland & K Kemp op cit note 16 at 5-82(14).

²⁰² Ibid.

²⁰³ Corporate Leniency Policy 2008 at para 11.1.3

The Commission usually grants conditional immunity to the applicant at this initial stage of the application so as to foster a good atmosphere and trust between itself and the applicant pending finalisation of the leniency process.²⁰⁴ Conditional immunity precedes total or no immunity.²⁰⁵

Paragraph 9.1.1.2 of the CLP states that the Commission will give the applicant total immunity after it has completed its investigation and referred the matter to the Tribunal and once a final determination has been made by the Tribunal or the Competition Appeal Court ('the CAC'), provided of course, that the applicant has met the requirements and conditions as set out in the CLP. The Commission reserves the right to revoke conditional immunity at any stage prior to total immunity being granted where the applicant fails to co-operate or adhere to any conditions or requirements under the CLP.²⁰⁶ Although the courts seem to have presumed that the Commission will be entitled to refer a complaint against an applicant who acquired immunity if it emerges that the applicant has not complied with all conditions and requirements for immunity; it is doubtful that the Commission would be entitled to grant a conditional non-referral in this manner and be able to change its decision not to refer, especially where the complaint was not initiated by the Commission.²⁰⁷

After granting conditional immunity the Commission will move ahead with its investigations and analyse and verify the information and evidence obtained from the applicant.²⁰⁸ During this process the firm is required to co-operate with the Commission and must continue to do so until investigations are finalised and any subsequent proceedings in the Tribunal are completed. The firm must provide the Commission with complete and accurate disclosure of information, documents and evidence it has relating to the cartel activity and must immediately desist from further engaging in cartel activity. It must also not alert other cartel members that it has applied for leniency.²⁰⁹

²⁰⁴ Ibid, para 9.1.1.1.

²⁰⁵ Ibid, para 9.1.1.2 .

²⁰⁶ Ibid, para 9.1.1.3.

²⁰⁷ P Sutherland & K Kemp op cit note 16 at 5-82(11).

²⁰⁸ Corporate Leniency Policy 2008 at para 11.1.4.

²⁰⁹ Ibid, para 10.1.

Once the Commission is satisfied that it has adequate information to institute proceedings it will call a final meeting with the applicant and inform it accordingly. The applicant is expected to continue to co-operate fully and expeditiously.²¹⁰

What is paramount to the applicant is the fact that where it has been granted immunity the Commission will not expose it to a hearing before the Tribunal for its involvement in the cartel and would consequently not request that any administrative fine be imposed on it.²¹¹ Although the CLP does not attach criminal liability for any competition law violations, it does not indemnify the applicant from any criminal liability imposed by any provision of the Act nor does it limit the rights of any party injured by the cartel activity to bring a civil action against the applicant for the harm which it has suffered as a result of the cartel conduct in respect of which the Commission granted immunity.²¹²

Total immunity will be granted to a successful applicant, once the Tribunal or CAC has reached a final decision in respect of the alleged cartel.²¹³

The CLP therefore serves to encourage cartel members to provide information to the Commission which would otherwise often go undetected for long periods of time. It is intended to be an effective and efficient tool for prosecuting firms involved in cartel activities and discouraging and or eliminating the formation of cartels.

ii) Challenges to the CLP

The CLP has not been without its challenges. Of particular relevance, is the challenge to the lawfulness of the CLP in granting conditional leniency and consequently to the lawfulness of evidence obtained pursuant thereto. These issues were discussed in the case of *Agri Wire (Pty) Ltd v The Competition Commissioner*²¹⁴ in both the court *a quo* and the SCA.

²¹⁰ Ibid, para 11.1.5.

²¹¹ Ibid, para 3.3.

²¹² Ibid, para 5.9 read with para 6.4.

²¹³ Ibid, para 9.1.2.1.

²¹⁴ [2011] 1 CPLR 175 (CT) and [2012] 4 All SA 365 (SCA).

In brief the facts of the matter were that the parent company of Consolidated Wire Industries (Pty) Ltd (“CWI”) was the subject of an investigation by the Commission. As a result a decision was taken to conduct internal investigations to ascertain whether any other company in the group had been involved in anti-competitive conduct. CWI was one such company. CWI therefore approached the Commission in terms of the CLP and disclosed the alleged cartel and information it had pertaining to its operation. The Commission granted CWI conditional immunity. After conducting its own investigation it referred the allegations relating to the cartel to the Tribunal. Agri Wire was one of the firms cited as being involved in the alleged cartel by the Commission in its referral to the Tribunal. Although CWI was cited, the Commission explained that it did not seek relief against CWI as it had been granted conditional immunity in terms of the CLP; it was cited ‘purely for the interest it may have in [the] proceedings’.²¹⁵

The main contentions of Agri Wire’s case before the SCA as set out in Agri Wire’s founding affidavit were, *inter alia*, ‘whether or not it was competent for the [Commission] to make promises of conditional immunity to [CWI] to obtain evidence, and if it was not competent for it to do so, whether such evidence [was] inadmissible in subsequent proceedings’.²¹⁶ In other words the argument was that in light of the fact that the Commission is a creature of statute, it cannot be selective in deciding which members of a cartel to investigate and refer to the Tribunal, nor can it grant immunity from an adverse adjudication and imposition of a penalty in return for information under the CLP as the Act does not authorise the Commission to do so.²¹⁷

The first question to ask is what is meant by ‘immunity’? The CLP provides that immunity means that the Commission will not subject a successful applicant to adjudication before the Tribunal for its role in the cartel and furthermore it would not impose a fine on that applicant.²¹⁸ Adjudication is described as a referral of a Chapter 2 contravention by the Commission to the Tribunal with a view to getting a

²¹⁵ [2012] 4 All SA 365 (SCA) at para 3 – 4.

²¹⁶ Ibid, para 5.

²¹⁷ Ibid.

²¹⁸ Corporate Leniency Policy 2008 at para 10.1.

prescribed fine imposed on the wrongdoer. Prosecution is ascribed a similar meaning.²¹⁹

In the court *a quo*, Zondo J, who handed down the judgment, took the view that the Commission does not have the final say in respect of what happens to a cartel participant who applies for leniency under the CLP. It can merely request and recommend to the Tribunal not to impose a penalty but this would not be binding on the Tribunal as it has the ultimate authority to decide whether or not to grant the applicant relief.²²⁰ To adopt this approach to the CLP would be absurd and would undermine its efficacy. The effect of this approach would be that although an applicant is granted conditional immunity by the Commission, has co-operated fully with the investigation and the Commission has recommended against imposing an administrative penalty, the Tribunal, in exercising its discretion may, in any event, opt to impose a fine of up to 10 per cent of the firm's annual turnover. No shrewd businessman is going to risk exposing a cartel without a guarantee that the firm will not be subjected to a fine. Fortunately, the SCA realised the potential pitfall of such an approach. The SCA highlighted the fact that the CLP repeatedly refers to the Commission as being the party to grant leniency and that there is no mention of the Tribunal as being the party to determine total immunity. It further pointed out that the distinction between conditional and total immunity would be irrational if the Tribunal was entitled to ignore the Commission's grant of conditional immunity to a party and impose on it an administrative penalty.²²¹

The SCA held that the real issue in question was whether the Act empowered the Commission to frame and adopt the CLP in such terms so as to provide for the granting of conditional and then final immunity to self-confessing cartels.²²²

Agri Wire maintained that whilst the Commission was broadly speaking entitled to adopt a policy such as the CLP, it was not entitled to grant conditional immunity as this should be granted at the instance of the Tribunal in exercising its powers under section 59 of the Act in determining appropriate relief.²²³ The SCA however maintained that the Act specifically provides that the Commission is

²¹⁹ Ibid, para 3.3 fn 4.

²²⁰ [2011] 1 CPLR 175 (CT) at para 62.

²²¹ [2012] 4 All SA 365 (SCA) at para 7 – 9.

²²² Ibid, para 21.

²²³ Ibid, para 23.

responsible for implementing measures to encourage market transparency and to investigate and evaluate Chapter 2 contraventions²²⁴ (which includes involvement in prohibited practices). Cartel activity clearly undermines market transparency and therefore the Act must empower the Commission to put in place measures to perform its aforementioned functions. It follows that the Commission is entitled, under the Act, to adopt and implement the CLP by granting conditional and final immunity to a party who discloses cartel activity and provides evidence and co-operates in the investigation of the cartel.²²⁵

The court *a quo* did not fully deal with the question whether the Commission may conclude agreements with parties against whom complaints have been made. Such an agreement would probably have to take the form of a consent order for it to be enforceable. Without this agreement, a person who has been granted immunity may still land up before the Tribunal for adjudication through a referral by an outside complainant or by the making of a new complaint by an aggrieved party where the Commission initiated the complaint.²²⁶ Even though this will give the Tribunal some discretion in terms of confirming the consent order, this discretion would be more limited than on the approach put forward by Zondo J.²²⁷

Furthermore, it was contended by Agri Wire that section 59(3) which sets out various factors to be considered by the Tribunal in determining an appropriate penalty, including the degree to which the respondent co-operated with the Commission and Tribunal, illustrates that it is the Tribunal that decides whether immunity should be granted and not the Commission.²²⁸ The SCA held that there was no merit in this submission; it affirmed that although the Tribunal can take this factor into account in determining a penalty, it does not have the effect that the Commission may not grant immunity.²²⁹ It is submitted that the legislature did not intend for this section to mean that the Tribunal has exclusive authority to decide whether immunity should be granted; rather it is likely that it intended for this factor to be taken into account in determining the penalty for a party which has not acquired immunity. In other words, it is submitted, that a party's willingness to co-operate will

²²⁴ Act 89 of 1998, section 21(1)(a) and (c).

²²⁵ [2012] 4 All SA 365 (SCA) at para 22.

²²⁶ P Sutherland & K Kemp op cit note 16 at 5-82(9).

²²⁷ Ibid.

²²⁸ [2012] 4 All SA 365 (SCA) at para 23.

²²⁹ Ibid, para 26.

be a relevant factor in assessing what percentage of its annual turnover should be levied against it as a penalty where it was unable to obtain immunity for not being ‘first to the door’, as was the case in the *Tiger Consumer Brands Ltd*²³⁰ matter. It may also be a relevant factor where a firm is subjected to an administrative penalty as a result of immunity subsequently being revoked. To hold that the corollary of section 59(3)(f) is that the Tribunal decides whether to grant immunity would be to impute to it an unintended meaning.

Agri Wire argued further that when the Commission refers a complaint to the Tribunal it is required to refer the entire complaint and it cannot be selective in referring only some cartel participants to adjudication before the Tribunal or seeking a penalty only in respect of some participants. Its objection was that ‘otherwise the playing fields [would not be] level and the party that obtained leniency would be unfairly advantaged’²³¹.

The practice of the Commission in referring a complaint to the Tribunal has been to include therein the conduct of the party who has received conditional immunity. The Commission has refrained from requesting any relief against that party and asserts that the party is cited merely for the interest which it may have in the proceedings.²³² According to Zondo J, this practice means that the party who received immunity was before the Tribunal as was the complaint against that party.²³³

The SCA dismissed this line of reasoning. It held that at the end of an investigation, the Commission may in accordance with its express statutory powers refer some or all of the particulars of the complaint and may exclude or add members of the cartel to the referral.²³⁴ However, doubt has been expressed as to whether section 50(3) which allows the Commission to refer parts of complaints where the complaint is not initiated by it, can be used as justification in all instances.²³⁵ On the other hand, if the Commission did not have the authority to exclude co-operative cartel members from the referral to the Tribunal, firms would be disinclined to volunteer information on cartel conduct which would in turn undermine the efficacy

²³⁰ 1 CPLR 71 (CT). See the discussion under Criminal Sanctions below.

²³¹ [2012] 4 All SA 365 (SCA) at para 23.

²³² P Sutherland & K Kemp op cit note 16 at 5-82(7).

²³³ Ibid.

²³⁴ [2012] 4 All SA 365 (SCA) at para 24.

²³⁵ P Sutherland & K Kemp op cit note 16 at 5-82(7).

and success of the CLP. Accordingly, the assertion that the grant of leniency to a party amounts to an unfair advantage makes little sense considering that the very purpose of the CLP is to offer firms an incentive to break rank and disclose cartel conduct. Moreover, the Commission is more concerned with identifying cartel conduct and bringing to an end such anti-competitive behaviour than ensuring that each member of the cartel receives a penalty. It ‘considers it more appropriate to forsake relief against one cartel member in exchange for uncovering and proceeding against the remainder of the cartel’²³⁶.

iii) The Strengths and Shortcomings of the CLP

The amendments effected by CLP have dealt with many of the weaknesses of the 2004 CLP.

The 2004 CLP allowed for too much discretion by the Commission in granting leniency which meant that firms were likely to be reluctant in coming forward as immunity was not guaranteed.²³⁷ However the CLP now provides for an almost automatic leniency in that the Commission is obliged to grant an applicant final immunity once its investigations have been finalised and the Tribunal or CAC has made a final decision in respect of the matter referred to it. The idea is to grant leniency because the applicant is ‘first to the door’ and not because it is considered as less of a cartel member than the other cartel members.²³⁸

Overtime leadership in the cartel might change or the cartel members may have together taken the decision to form the cartel and this would make it difficult for a firm, acting in good faith, to qualify for leniency.²³⁹ Thus it is sensible that any member of a cartel is now entitled to approach the Commission for leniency and that firms which instigate cartels or which coerce other firms to join or remain in a cartel are no longer excluded from applying for leniency.

The CLP also allows for a firm to apply for a marker thereby retaining its position as ‘first to the door’ for leniency while it collates evidence and information

²³⁶ [2011] 1 CPLR 175 (CT) at para 59.

²³⁷ K Moodaliyar op cit note 4 at 175.

²³⁸ P Sutherland & K Kemp op cit note 16 at 5-82(14).

²³⁹ K Moodaliyar op cit note 4 at 175.

to support its application which will have to be submitted to the Commission within certain time frames. Provided that the applicant adheres to these time periods and other requirements for immunity, the immunity application will be deemed to have been made on the date on which the marker was granted.²⁴⁰

As a member of the International Competition Network, South Africa has to a large extent adhered to the recommended practices for leniency programs. In this regard, the CLP:

- a) makes leniency available both where the competition authorities are unaware of the cartel and where they are aware of the cartel but do not have sufficient evidence to proceed to adjudicate or prosecute;
- b) provides for the use of markers in the application process;
- c) requires full and frank disclosure and ongoing cooperation throughout the process by the applicant; and
- d) keeps the identity of the leniency applicant and any information provided by the leniency applicant confidential unless the leniency applicant provides a waiver, the agency is required by law to disclose the information, or the leniency applicant discloses its application.²⁴¹

The CLP does however have a number of weaknesses, many of which are similar to the difficulties and challenges faced by other developing countries.

The ICN recommends that second and subsequent co-operating firms should also be given lenient treatment and this would be in keeping with the approach taken by a number of other jurisdictions. The advantage in this is that firms who have valuable evidence and do not want to disclose it for fear of reprisal may be more willing to assist the Commission.²⁴² Whilst the CLP does allow for lenient treatment (less than full leniency) for second and subsequent co-operating cartel members in that they *may* be given a reduced fine or permitted to enter a settlement agreement or consent order, it is submitted there should be certainty as to the nature of the lenient treatment that will be received. For example, the CLP could provide for an automatic and pre-determined penalty discount for the second firm which furnishes the Commission with new and relevant information.

²⁴⁰ P Sutherland & K Kemp op cit note 16 at 5-82(15).

²⁴¹ International Competition Commission op cit note 38.

²⁴² Ibid.

The Commission does not actively pursue joint or co-operative efforts and investigations with other countries. The ICN commends competition authorities which attempt to work with other jurisdictions in respect of preventing anti-competitive behaviour and suggests that competition authorities could ask competition authorities in other jurisdictions whether the applicant has been granted leniency and what conditions have been imposed on it.²⁴³ It is proposed that the Commission would enjoy considerable success in detecting cartels where it co-ordinated and corresponded with authorities in other jurisdictions. In return, the Commission could assist those jurisdictions by encouraging applicants to apply for leniency in those jurisdictions.

Moreover, an applicant which has obtained immunity is still not protected from civil or criminal liability arising from the conduct in question. A third party who has suffered harm or damages may seek redress against the applicant.²⁴⁴ Thus immunity does not guarantee the applicant that it will be able to avoid all consequences for its conduct and in some instances this may be enough of a deterrent from coming forward.

The CLP does not offer an applicant blanket immunity. Immunity from adjudication is only granted in respect of cartel related activities and not in respect of other contraventions under the Act.²⁴⁵ The result is that even where an applicant has obtained immunity in respect of a prohibited practice, the Commission may refer a complaint against the applicant to the Tribunal in relation to non-cartel infringements.²⁴⁶ In the matter of *Clover Industries Ltd v Competition Commission*²⁴⁷ the Commission did exactly this and although the firm applied for dismissal of the referral on the basis of prejudice, the application was dismissed. The obvious problem for a firm in this position is that in terms of the CLP it is required to furnish the Commission with complete and truthful disclosure of all evidence in its possession relating to the cartel activity and must offer full and expeditious co-

²⁴³ Ibid.

²⁴⁴ P Sutherland & K Kemp op cit note 16 at 5-82(9).

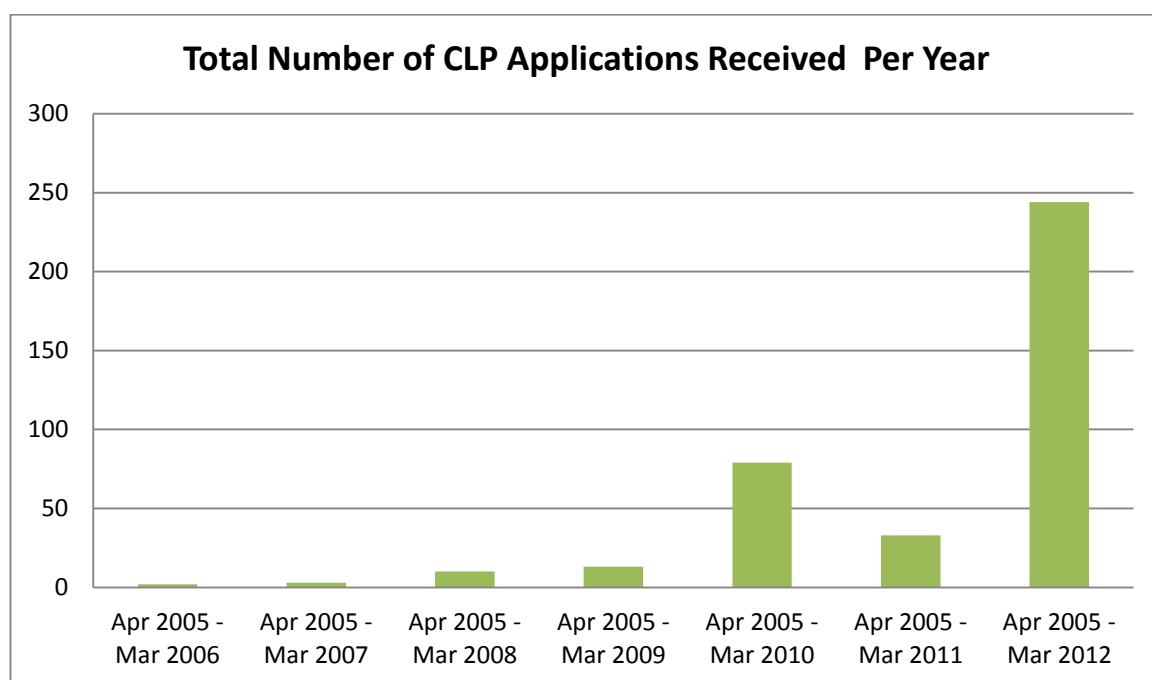
²⁴⁵ Corporate Leniency Policy 2008 at para 5.

²⁴⁶ P Sutherland & K Kemp op cit note 16 at 5-82(12).

²⁴⁷ [2008] 2 CPLR 312 (CT).

operation to the Commission²⁴⁸ whilst at the same time it must defend itself from prosecution by the Commission in respect of any non-cartel infringements.²⁴⁹

Although the South African CLP is still in its early stages it has overcome many of its initial teething problems and has achieved some notable successes as is evidenced by the increasing number of leniency applications made per year as depicted in the graph below:-²⁵⁰



c) Criminal Sanctions

One of the most effective means of deterring firms from engaging in prohibited practices is the imposition of sanctions or penalties where they are found guilty of engaging in such conduct.

²⁴⁸ Corporate Leniency Policy 2008 at para 10.

²⁴⁹ P Sutherland & K Kemp op cit note 16 at 5-82(12).

²⁵⁰ Competition Commission 'Annual Report 2011/2012' available at <http://www.compcom.co.za/assets/Publications/Annual-Reports/COMPETITION-COMMISSION-AR11-12-LOW-RESWITH-HYPERLINKS.pdf> accessed on 19 June 2013. At the time of writing the 2012/2013 Annual Report was not available.

The Act punishes cartel conduct by imposing an administrative penalty on the firm for involving itself in a prohibited practice under section 4(1)(b).²⁵¹ The penalty may not exceed 10 per cent of the firm's annual turnover in and its exports from the Republic during the firm's preceding financial year.²⁵² Factors that are taken into account when determining an appropriate fine include the nature, duration, gravity and extent of the contravention; the losses suffered or profits derived as a result of the contravention; the prevailing market conditions at the time when the contravention took place and the degree to which the respondent co-operated with the Commission and Tribunal.²⁵³

Although administrative penalties may be very high as in the *Tiger Consumer Brands Ltd*²⁵⁴ case where an administrative penalty in the amount of 5.7 per cent of the respondent's turnover from baking operations nationally in the year of 2006 equated to R98 784 869.90 (ninety eight million seven hundred and eighty four thousand eight hundred and sixty nine rand, ninety cents),²⁵⁵ they may still be inadequate to deter large wealthy firms. These large wealthy firms may well be in a position to absorb the penalties or may have the resources to appeal decisions or findings to the highest courts whilst continuing in the interim to derive benefits from the prohibited practice.²⁵⁶ Even in matters such as the *Tiger Consumer Brands Ltd* case where the respondent admits to being in contravention of section 4(1)(b),²⁵⁷ its directors were in no way held responsible. Rather it is, by and large, the firm's employees, shareholders and consumers which bear the burden of the administrative penalty through lesser dividends, decreased share prices and job losses.²⁵⁸

Evidently, the penal provisions were directed at firms who engaged in prohibited practises and were not aimed at examining or penalising the conduct of directors or those in control of the firm's activities. It has been suggested that the Act may have initially been drafted in this manner so as to be in keeping with company law which distinguishes between the acts of a company and those in control of the

²⁵¹ Act 89 of 1998 as amended, section 61(1).

²⁵² Ibid, section 61(2).

²⁵³ Ibid, section 61(3).

²⁵⁴ 1 CPLR 71 (CT).

²⁵⁵ Ibid, 75.

²⁵⁶ L Jordaan & PS Munyai 'The Constitutional Implications of the New Section 73A of the Competition Act 89 of 1998' (2011) 23 *SA Merc LJ* 197 at 205.

²⁵⁷ 1 CPLR 71 (CT) at 74 – 75.

²⁵⁸ L Jordaan & PS Munyai op cit note 256 at 211.

management of the company - it is only in rare circumstances that individuals will be held liable for the acts of the company.²⁵⁹ However, firms generally act through their directors and it is the directors who, despite their fiduciary duty to act in the best interests of the firm, by their conduct and direction involve the firm in prohibited practices.²⁶⁰ It seems to follow that holding directors responsible for engaging a firm in or turning a blind eye to a firm's cartel related activities would go some way in deterring them from forming cartels or engaging in cartel conduct. As many other countries²⁶¹ have already implemented measures to hold directors personally and/or criminally liable it is probably logical and expected that South Africa would follow this lead.

Section 73A of the Competition Amendment Act 1 of 2009 establishes a criminal cartel offence and has the effect that it will no longer be possible for directors acting in their official capacities to avoid personal and criminal liability by hiding behind the corporate veil.²⁶² However, this provision has not yet been promulgated.

Section 73A(1)(a) provides:-

‘A person commits an offence if, while being a director of a firm or while engaged or purporting to be engaged by a firm in a position having management authority within the firm, such person—

- a. caused the firm to engage in a prohibited practice in terms of section 4(1)(b); or
- b. knowingly acquiesced in the firm engaging in a prohibited practice in terms of section 4(1)(b).’

A director or a person having management authority may be prosecuted for an offence if the firm acknowledges in a consent order or the Tribunal or the CAC

²⁵⁹ Ibid, 200.

²⁶⁰ SL Monnye & S Afrika ‘Prison beckons directors involved in cartels’ (2008) 16 *Juta's Business Law* 13 at 13.

²⁶¹ See for example: the discussions on Brazil and Korea above; the United Kingdom under the Enterprise Act 2002 provides for a criminal sanction for individuals who take part in a criminal offence; the United States of America under the Sherman Act § 1, 15 USC § 1 provides that a person who makes or engages in a contract, combination or conspiracy which is declared illegal, commits a felony and is liable to a fine or imprisonment.

²⁶² SL Monnye & S Afrika op cit note 260 at 18.

has made a finding that the firm was engaged in price fixing, market allocation or collusive tendering.²⁶³ This acknowledgement in a consent order or finding by the CAC serves as *prima facie* proof in criminal proceedings against such persons that the firm engaged in a prohibited practice.²⁶⁴

Any person convicted of an offence under section 73A is liable to a fine not exceeding R500 000.00 (five hundred thousand rand) or a prison sentence not exceeding 10 (ten) years, or both.²⁶⁵ Furthermore, a firm may not directly or indirectly pay any fine imposed on a director or person in a position of management authority who has been convicted of such an offence, or indemnify, reimburse, compensate or otherwise defray the expenses incurred by such person in defending against prosecution proceedings, unless the prosecution is abandoned or the person in question is acquitted.²⁶⁶

One of the greatest concerns arising from the interplay between the administrative and criminal components of competition law is to what extent the introduction of this criminal offence will undermine the CLP. There is a very real risk that firms and individuals will be more reluctant to come forward and apply for leniency if there is a possibility they shall face criminal prosecution. Instead of increasing detection of cartels, the criminal sanction may result in them being driven further underground.

Moreover, there is a good chance that where allegations are made that a firm is involved in a prohibited practice and a complaint is initiated or proceedings are instituted against it, firms will become more litigious. Even in circumstances where a consent order could be signed firms may rather opt to vigorously defend themselves so as to guard against its directors and managing officer being criminally prosecuted, especially because it's usually those very people who decide whether to proceed with litigation. In addition, as competition is a relatively untested area of law there is lots of room for matters to be challenged and appeals to be brought and argued over. Subsections (i) and (ii) below will outline some of the issues with section 73A which could result in a greater potential for litigation such as difficulties of interpretation and the constitutionality of section 73A. The upshot is that the Commission will be

²⁶³ Act 89 of 1998 (as amended), section 73A(3).

²⁶⁴ Ibid, section 73A(5).

²⁶⁵ Ibid, section 74.

²⁶⁶ Ibid, section 73A(6).

drawn into protracted and costly legal proceedings, instead of a swift resolution of the matter. Therefore, unless section 73A is properly understood by firms and their directors and managing officers, it could potentially have the counter effect of undermining the CLP.

i) Interpretation and Understanding of Section 73A

In order to convict a person under section 73A all elements of the offence must be proved. However there are various ways of understanding and interpreting some of these elements which has the potential to create confusion and result in differing applications until such time as the Tribunal or CAC give direction in this regard.

What is first noticeable is that section 73A applies only to directors and persons in a position having management authority. This is in contrast to most other criminal offences which do not make the omission or commission of an act a crime on the basis of the category or class of person who commits the act.²⁶⁷ It is implausible that a firm could engage in cartel activities without such persons being aware and given that they owe a fiduciary duty to the firm²⁶⁸ it is sensible that the application of section 73A is restricted in this way.

Whilst it is clear who will qualify as a director of a firm, the same cannot be said about a person 'in a position having management authority within the firm'.²⁶⁹ It is suggested that one possible way of determining who has management authority would be to rely on the established principles and rules of attribution in company law where there is history of jurisprudence for ascertaining who is the 'directing mind and will'²⁷⁰ of a firm. South African common law would be instructive in determining where control and management of the firm resides in a person ranking lower than a director.²⁷¹

²⁶⁷ L Jordaan & PS Munyai op cit note 256 at 205.

²⁶⁸ Companies Act 71 of 2008, section 76.

²⁶⁹ L Jordaan & PS Munyai op cit note 256 at 205.

²⁷⁰ *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* 1915 AC 705 (HL)

²⁷¹ See for example: *Atlantic Harvesters of Namibia (Pty) Ltd v UnterweserReeder GmbH of Bremen: The St Pardarn* 1986 (4) SA 865 (C).

Section 73A(1)(a) requires a prosecution to prove that a director or person with management authority ‘caused’ the firm to engage in the prohibited practice²⁷² and this causation must be proved beyond a reasonable doubt. The wording of the sections begs the question what evidence will be acceptable for proving causation? Would mere attendance at a cartel meeting suffice or would hard evidence be required, for example that such person structured and instigated the cartel on behalf of the firm?²⁷³

Furthermore section 73A(1)(a) requires the director or managing officer to have ‘knowingly acquiesced’ in the firm engaging in the prohibited practice. ‘Knowingly acquiesced’ means having acquiesced while having *actual knowledge* of the relevant conduct by the firm [*emphasis added*].²⁷⁴

The present meaning of ‘knowingly acquiesced’ can be contrasted to the meaning it was given under the Competition Amendment Bill²⁷⁵ (“the Bill”) wherein it was held that ‘knowingly acquiesced’ meant:-

- (a) ‘having actual knowledge of the relevant conduct by the firm; or
- (b) being in a position in which the person reasonably ought to have—
 - i. had actual knowledge of the facts contemplated in paragraph (a); or
 - ii. investigated the matter to an extent that could have provided such person with actual knowledge of the facts contemplated in paragraph (a); or
 - iii. taken other measures which, if taken, could reasonably be expected to have provided such person with actual knowledge of the facts contemplated in paragraph (a).²⁷⁶

The Bill under subparagraph (b) introduced the concept of constructive knowledge in terms whereof a director or managing officer ought to have known or ought to have taken steps so that he could reasonably be expected to obtain such

²⁷² Act 89 of 1998, section 73A(1)(a).

²⁷³ L Kelly ‘The Introduction of a ‘Cartel Offence’ into South African Law’ (2010) 2 *Stell LR* 321 at 330

²⁷⁴ Act 89 of 1998 (as amended), section 73A(2).

²⁷⁵ Competition Amendment Bill [B31 – 2008] *GG* 31101 of 29 May 2008.

²⁷⁶ *Ibid*, section 73A.

knowledge.²⁷⁷ This section was omitted from the Amendment Act leaving only the notion of actual knowledge as being a requirement. As the doctrine of constructive knowledge does not apply, inferences cannot be made about what such person ought to have known.

Case law can also be enlightening as to what is meant by ‘knowingly’ or ‘actual knowledge’. In the case of *Du Plessis NO v Oosthuizen*²⁷⁸ it was held that “‘knowingly’ indicate[s] action accompanied by the full knowledge of the facts’²⁷⁹. If section 73A were to be given this narrow meaning the result would be that directors or managing officers would only be guilty of an offence when they caused a firm to engage in cartel activities or they had full knowledge of *all* aspects of the cartel activity.²⁸⁰

Interpreting section 73A strictly has the potential to lead to inappropriate outcomes. For example, a director or managing officer may be able to avoid liability on the basis that he lacks actual or full knowledge. Circumstances could then arise where a director or managing officer instructs a subordinate to attend the meetings regarding price fixing and to implement the necessary measures in his stead with the very intention of escaping liability on this basis.²⁸¹ Disputing actual knowledge may be fairly simple unless the prosecution has hard evidence, adding to this difficulty is that the phrasing of this section allows for the possibility of disputing acquiescence.²⁸² Therefore the inclusion of knowledge in the form of *dolus eventualis* may be a less onerous interpretation of ‘knowingly’ which neither imputes knowledge to the person in question nor results in absurdities.

Knowledge in the form of *dolus eventualis* is generally understood as a party having subjective foresight of the reasonable or real possibility that the conduct or course of conduct would result in harm and the party reconciles himself to that fact and nevertheless proceeds or continues with that conduct.²⁸³ It is possible that *dolus eventualis* could fall within the realm of actual knowledge because the person in question subjectively foresaw the real possibility of harm occurring as a result of his

²⁷⁷ L Quilliam ‘Uneasy lies the head...’ (2011) 11 *Without Prejudice* 20 at 22.

²⁷⁸ 1999 (2) SA 191 (O).

²⁷⁹ *Ibid*, 196.

²⁸⁰ L Quilliam *op cit* note 277 at 20.

²⁸¹ *Ibid*, 22.

²⁸² L Kelly *op cit* note 273 at 330

²⁸³ *Simon NO v Mitsui and Co Ltd* 1997(2) SA 475 (W) at 526.

conduct, as compared with constructive knowledge where knowledge of the reasonable person is imputed to the party in question.²⁸⁴

Of course, the counter argument would be that the legislature purposefully omitted the notion of constructive knowledge from the Amendment Act and provided for a narrow understanding of ‘knowingly’. Hence, if they had intended to incorporate *dolus eventualis* into the concept of ‘knowingly’ they would have done so expressly.

ii) Constitutional Issues relating to Section 73A

Criminalising competition law has not only resulted in challenges relating to the interpretation and understanding of section 73A but it has also elicited debate as to whether it impinges on constitutional rights, such as the right to a fair trial.

Directors and managing officers may be wary of coming forward and disclosing information relating to their firm’s engagement in cartel conduct or other cartel activities for fear of self-incrimination and for fear of that evidence being used against them in subsequent criminal proceedings under section 73A.²⁸⁵ The right to a fair trial, including the rights to be presumed innocent and not to be compelled to give self-incriminating evidence, arise from the moment a person is arrested and thus it could be argued that these rights may be infringed should a director or managing officer disclose such information in terms of a leniency application.

In the United Kingdom, where the Office of Fair Trading (‘the OFT’) (being the body concerned with both the administrative and criminal enforcement of competition law in the UK) conducts investigations in both respects, evidence obtained pursuant to administrative proceedings cannot be used in criminal proceedings, although the converse is possible.²⁸⁶ Given that this principle already exists in South African law it is submitted that the competition authorities should adopt the same approach to evidence in competition matters. The view as espoused

²⁸⁴ L Quilliam op cit note 277 at 20.

²⁸⁵ L Jordaan & PS Munyai op cit note 256 at 209

²⁸⁶ L op cit note 273 at 329.

in *Ferreira v Levin NO and Others*²⁸⁷ is that ‘as long as incriminating evidence is not admissible at the criminal trial and the use of “derivative evidence” at such trial is made dependent on the use being subject to “fair criminal standards”, the rule against self-incrimination is adequately protected’²⁸⁸. Although, the aforesaid matter was decided in the context of civil proceedings it seems likely that the same reasoning would be applied to proceedings of an administrative nature. This view is reinforced having regard to section 49A(3) in terms whereof self-incriminating statements made in response to a summons by the Commission investigating a cartel are generally inadmissible as evidence against that person in criminal proceedings. Self-incriminating evidence provided by a director or managing officer in disclosing cartel conduct or during proceedings against a firm which has engaged in a prohibited practice should not be used in criminal proceedings and in this way the competition authorities could steer clear of a constitutional challenge on the basis of an infringement of the fair trial rights.

It is apparent that where an acknowledgement in a consent order is obtained or a finding is made by the Tribunal or CAC that the firm engaged in a prohibited practice, this constitutes *prima facie* proof in proceedings against a director or managing officer that the firm engaged in such conduct.²⁸⁹ In other words, it creates a presumption that the firm has engaged in cartel conduct.

Where a presumption creates a reverse onus of proof it can lead to it being challenged for lack of constitutionality. In *S v Coetzee*²⁹⁰ it was held that it is always for the prosecution to prove the guilt of the accused person and that the proof must be proof beyond a reasonable doubt.²⁹¹ The function of the reverse onus is to relieve the prosecution from proving all elements of the offence with which the accused was charged and once the presumption is established the onus of disproving it falls on the accused.²⁹² Presumptions which fall into the category of reverse onus are held to infringe the accused’s right to be presumed innocent as envisaged by section 25(3) of

²⁸⁷ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell No and Others* 1996 (1) SA 984 (CC).

²⁸⁸ *Ibid*, at para 185.

²⁸⁹ Act 89 of 1998 (as amended), section 5.

²⁹⁰ 1997 3 SACR (CC). See also *S v Zuma* 1995 1 SACR 568 (CC).

²⁹¹ 1997 3 SACR (CC) at para 8.

²⁹² *Ibid*, para 6 - 7.

the Constitution²⁹³ and have been struck down by the Constitutional Court again and again.

The presumption created by section 73A(5) relieves the National Prosecution Authority ('the NPA'), when prosecuting a director or managing officer, of the burden of having to re-prove a section 4(1)(b) infringement which has already been established by the competition authorities. The consequence is that the person being prosecuted cannot contend that section 4(1)(b) was not infringed and it therefore limits the defences available to him.²⁹⁴ It is maintained that the presumption does not create a reverse onus and accordingly does not infringe the accused's right to be presumed innocent. It does not have the effect that the accused must discharge the presumption in order to avoid being convicted. The NPA still bears the onus of proving all other elements of the offence, namely that the person in question caused or knowingly acquiesced in the firm engaging in a prohibited practice beyond a reasonable doubt.²⁹⁵ Essentially, the presumption relates only to the conduct of the firm and not to that of a director or person in a management position. It seems highly unlikely that a constitutional challenge to section 73A(5) on the grounds that it infringes the presumption of innocence would succeed.

Section 73A(6) provides that it is impermissible for a firm to come to a director or managing officer's aid where he is convicted of an offence and assist with paying any administrative fine imposed. The implication is that those in charge of shareholder's funds cannot get assistance from the firm. The wording of section 73A(6)(b) is phrased widely enough so that even where a firm raises finance or provides security for the costs of the proceedings it is probable that it will fall within the scope of the section.²⁹⁶ The section is curtailed by the proviso 'unless the prosecution is abandoned or the person is acquitted' but this proviso itself requires clarification. It could be construed as meaning that a firm may provide its directors or managing officers with pecuniary assistance in putting up a defence on condition that these funds are repaid if a finding is made against the director or managing officer.²⁹⁷ It could also mean that the director or managing officer must cover his own legal costs but where the prosecution is abandoned for whatsoever reason or where the

²⁹³ Ibid, para 6.

²⁹⁴ L Kelly op cit note 273 at 331.

²⁹⁵ L Jordaan & PS Munyai op cit note 256 at 209.

²⁹⁶ L Kelly op cit note 273 at 332.

²⁹⁷ Ibid.

Tribunal or CAC finds that the director or managing officer is not guilty of a section 73A offence, he can recoup the costs from the firm.²⁹⁸ The latter seems to be more in line with the purpose of the section and is probably more easily enforceable.²⁹⁹ Issues pertaining to the constitutionality of the section arise where such person is both the director of the firm and a shareholder because preventing him from borrowing money from the firm (especially where it is his only source of revenue) may be held to infringe his constitutional right to a fair trial.³⁰⁰ It is probable that section 73A(6) will come under scrutiny in legal proceedings in due course.

iii) The Interplay between the Commission and the NPA

In terms of section 179(2) of the Constitution of the Republic of South Africa, the NPA is empowered to ‘institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings’³⁰¹. In keeping with these powers the NPA has exclusive powers to enforce section 73A.³⁰² From section 73A(3) it is evident however that the NPA may only prosecute a person in terms of this section where the firm has acknowledged in a consent order or the Tribunal or CAC has made a finding that the firm engaged in a prohibited practice.

Clearly, the competition authorities which have been established to enforce an economic statute have a completely different role from the NPA; nevertheless the parameters of their functions are not wholly manifest in the competition law arena. This raises questions as to whether it is appropriate to incorporate criminal sanctions in competition law.

The NPA should ensure that the prosecution process is fair and transparent. It has its own prosecutorial policies for deciding whether or not to prosecute and should only proceed ‘when a case is well founded upon evidence reasonably believed to be

²⁹⁸ Ibid.

²⁹⁹ Ibid.

³⁰⁰ L Ibid.

³⁰¹ Act 108 of 1996, section 197(2).

³⁰² L Kelly op cit note 273 at 328.

reliable and admissible³⁰³. When making a fair decision to prosecute, the NPA may take account of various public interest factors including the nature and seriousness of the offence, including the impact that it has on the community; the interest of the victim and the broader community and the circumstances of the offender, including admissions of guilt, repentance or willingness to co-operate with the authorities.³⁰⁴

Section 50(1) of the Act holds that the Commission may after receiving or initiating a complaint certify a particular respondent or person as deserving of leniency, with or without conditions,³⁰⁵ in that the person in question provided information to the Commission or otherwise co-operated with the Commission's investigation of an alleged prohibited practice to the satisfaction of the Commission³⁰⁶. In other words, it purports to extend leniency to directors or managing officers in prosecution proceedings where they have assisted the authorities.

It has been proposed that in terms of section 73A(4) it is predominantly the Commission's decision to determine whether or not the criminal prosecution of a director is suitable.³⁰⁷ It is submitted however that this viewpoint is inaccurate and no ultimate power is given to the Commission to grant leniency or immunity from criminal prosecution. It would seem that the Commission's role is more passive – where a person has not been certified as deserving of leniency, it plays no role in the decision to prosecute and where a person has been certified as deserving of leniency the Commission may not seek or request that the person be prosecuted but may make submissions to the NPA in support of leniency of that person where he is being prosecuted for a section 73A offence³⁰⁸. The wording of the section does not lead to the inference that the Commission may, in any circumstances, dictate or recommend the NPA to institute criminal proceedings. Thus notwithstanding the fact that the Commission may make submissions to the NPA for leniency, the NPA must still exercise its own discretion whether or not to prosecute and must do so free of

³⁰³ National Prosecuting Authority 'Ethics – a practical guide to the ethical code of conduct for members of the National Prosecuting Authority' available at [http://www.npa.gov.za/UploadedFiles/Ethics%20\(Final\).pdf](http://www.npa.gov.za/UploadedFiles/Ethics%20(Final).pdf) accessed on 15 June 2013.

³⁰⁴ Ibid.

³⁰⁵ Act 89 of 1998 (as amended), section 50(1).

³⁰⁶ Ibid, section 1.

³⁰⁷ See L Jordaan & PS op cit note 256 at 202.

³⁰⁸ Act 89 of 1998, section 73A(4).

interference or influence.³⁰⁹ The reality may be that the NPA is guided by the advices of the Commission but there is no guarantee that this will be the case. For example, it was stated above that one of the factors taken into account by the NPA in deciding whether to prosecute is the accused's willingness to co-operate. This factor aligns with section 50(1) in so far as it requires a director or managing officer to provide information or to co-operate with the Commission's investigation in order to qualify for leniency.³¹⁰ In certain instances though the factors considered by the NPA may not accord with the circumstances in which the Commission will hold a person to be deserving of leniency and thus the Commission will have to frame its submissions to the NPA in line with its prosecutorial policies if it wishes them to be of use and to be taken into consideration by the NPA.³¹¹

The failure of the Amendment Act to detail the relationship between the NPA and the Commission may result in uncertainty as to how cases should be handled between the two bodies. In particular it will lead to concerns of expertise, co-ordination of cartel matters and the issue of state resources.³¹² The South African criminal justice system is already overburdened and is hardly likely to give such matters the attention they require. Public prosecutorial bodies tend to lack expertise in competition law and do not understand the intricacies and nuances thereof; the NPA will no doubt find itself in the same position. It seems probable that these competition matters will end up being dealt with by the Specialised Commercial Crimes Unit which usually deals with corporate statutory offences.³¹³ If it is this arm of the NPA that prosecutes individuals under section 73A, it is scarcely likely to have sufficient resources or expertise available to properly and effectively investigate cartels. It is therefore argued that the Competition Commission which has the requisite knowledge and expertise should be given a greater role in the investigation and prosecution of these matters. Issues of expertise could largely be avoided by allowing the competition authorities to handle both the administrative and criminal aspects of competition law enforcement, as has been done in other countries.

³⁰⁹ National Prosecuting Authority Act 32 of 1998, section 32(1).

³¹⁰ R Wilson & L Avivi 'When leniency is uncertain' (2009) 9 *Without Prejudice* 6 at 7.

³¹¹ Ibid.

³¹² L Kelly op cit note 273 at 328.

³¹³ Ibid.

The Commission has entered into Memorandums of Understanding with other institutions such as the Council for Medical Schemes and the Independent Communications Authority of South Africa which set guidelines for their co-operation in areas of overlapping or complementary jurisdiction.³¹⁴ It is hoped that the Commission will enter into a similar type of Memorandum of Understanding with the NPA so as to provide clarity and insight as to how the two institutions intend working together.

iv) The Effect of the Criminal Sanction

In light of the above difficulties, it must be questioned whether a criminal penalty is justifiable and should be promulgated or whether there is not some other more appropriate mechanism for contending with directors and managing officers who are instrumental in their firm's cartel related activities. In other words, is there not a less restrictive means of holding directors or managing officers personally accountable? One option which has been put forward is for that person to be disqualified as a director or from holding a managerial position.³¹⁵ In terms of section 69(8) of the Companies Act, it provides that a person may be disqualified as a director where a court has prohibited that person from being a director or has declared him to be delinquent in terms of section 162³¹⁶. The wording of section 162 is probably broad enough to encompass instances where a director caused or knowingly acquiesced in the firm engaging in a prohibited practice. Another possibility would be to impose administrative penalties on not only the firm but also on the director or managing officer in his personal capacity. As mentioned above, in terms of the new Brazilian Competition Act, law 12.529/2011 directors of firms may be subjected to a prison sentence and a fine ranging from 1 per cent to 20 per cent of the fine imposed on the firm.³¹⁷ In the United Kingdom, the Enterprise Act provides for a term of imprisonment of up to 5 (five) years to be imposed or an unlimited fine.³¹⁸ The

³¹⁴ 'MoU' available at <http://www.compcom.co.za/mou/> accessed on 15 June 2013.

³¹⁵ L Jordaan & PS Munyai op cit note 256 at 212.

³¹⁶ Act 71 of 2008, section 69 read with section 162.

³¹⁷ T Rhodes and P Warne 'Brazil: The New Brazilian Competition Act' available at <http://www.mondaq.com/x/166010/Antitrust+Competition/The+New+Brazilian+Competition+Act> accessed on 9 October 2012.

³¹⁸ Enterprise Act 2002, section 190(1)(a).

submission here is that a fine could possibly be imposed on the director as an alternative, rather than in addition, to imprisonment and accordingly the limit of the fine should possibly be higher than that set by CADE in Brazil, if not unlimited. The director's involvement in the cartel, the cartel's duration, its impact on the relevant industry, the director's subsequent co-operation and so forth are factors which could be taken into account in determining a maximum fine. Given that section 73A(6) proscribes firms from assisting them, an administrative penalty which could have serious financial implications for the person in question may also be a practical way in which to deter membership in cartels.

The inclusion of a criminal sanction is however generally seen as a positive step because of the effect that it has on deterrence. However some of its inadequacies, such as its failure to detail the relationship between the Commission and the NPA resulting in it detracting from the CLP, its vague requirements of causation and knowing acquiescence and the constitutional issues will have to be dealt with and clarified in order for the offence to be more effective. Until such time as the Commission and NPA streamline the procedures for corporate leniency and immunity from prosecution more delays can be expected in the promulgation of this provision.

Furthermore, the introduction of a criminal offence must be embraced for bringing the South African competition law more in line with a number of other developed countries. The impact of the criminal sanction is already evidenced by looking at the increased number of leniency applications since the inception of the Amendment Act. From April 2005 to March 2009, a total of 28 leniency applications were received. From April 2009 to March 2012, 356 leniency applications have been received, with 244 of those being in the last 12 month period.³¹⁹ Whilst this huge increase probably cannot be solely attributed to the inclusion of a criminal sanction, it would be short-sighted to assume that it has not been a contributing factor.

³¹⁹ Competition op cit note 250.

VII. THE EFFECTIVENESS OF IMPOSING CRIMINAL SANCTIONS IN DEVELOPING COUNTRIES

Notwithstanding that both the OECD and the ICN have recommended to its members that criminal penalties be used in cartel enforcement, those countries which have implemented criminal sanctions in some form have little history of major criminal prosecutions despite the number of cartel cases.³²⁰

Whether criminal sanctions can be said to have a powerful deterrent effect is debatable. One has to question whether the benefits of imposing a criminal sanction, which is in essence the deterrent effect, exceeds the costs occasioned by a criminal system in running matters involving anti-competitive behaviour by cartels - including the costs of prosecution, prison administration and so forth.

What is evident from looking at the experiences of developing countries is that in order for criminal cartel enforcement to be effective there has to be cooperation between the competition authorities and the public prosecution. The public prosecution will require additional training and up-skilling in the area of competition law. Moreover, criminal proceedings should run in conjunction with or parallel to other competition enforcement programs such as leniency policies so as not to undermine them or detract from their effectiveness. The criminal cartel offence must also be clearly defined so that cartel members can be aware of what conduct is considered unlawful and the risks associated with engaging in such conduct.

The very fact that a criminal offence has been included by some jurisdictions into their leniency programs is a matter of controversy. The argument is that competition law is regulatory in nature. It is indicative of state policy and a state's willingness to intervene in economic and social activities.³²¹ Sanctions in competition law are there to deter participation in cartel activity whereas criminal offences are seen to be retributive in nature and highlight the moral wrong of an offence.³²² By bringing criminal sanctions into a civil law area there is the heightened concern for directors or managers that their conduct may fall within the

³²⁰ S Lee op cit note 76 at 56.

³²¹ L Kelly op cit note 273 at 324.

³²² Ibid.

ambit of the criminal offence and this may cause a ‘chilling effect’ on competitive commercial conduct to the detriment of the firm and consumers.³²³

When directors or managing officers involve their firms in cartels they weigh up the value of the cartel against the risk of a fine being imposed on the company, and in some instances the value may well outweigh any potential administrative fine. On the other hand, where there is the possibility of a criminal sanction the scale may weigh down on the other side because a director or managing officer is less likely to conclude that membership in a cartel outweighs a sanction which includes the deprivation of his personal liberty.³²⁴

In essence competition law exists to protect and promote consumer welfare. Imposing a criminal sanction cannot be linked to any direct benefit or advantage to the consumer whereas in situations where a competition authority finds against a firm it is compelled to cease and desist from participating in anticompetitive conduct and the proceeds of the fine may be used to compensate victims or go towards the competition authority’s budget (which will benefit the consumer whether directly or indirectly).

Moreover, there is a very real concern that the inclusion of a criminal sanction will detract from a country’s leniency program. Although a director or managing officer may be less likely to involve a firm in a cartel at the outset, for those who are already implicated there is a great possibility that they will avoid bringing a leniency application if they may still be prosecuted and sentenced to prison, even though the firm may be granted leniency. The effect is that cartels will become more secretive and are less likely to be detected and anti-competitive conduct will go unpunished.³²⁵ The fear of being prosecuted will also impede on legal proceedings because directors will be wary in giving testimony for fear of incriminating themselves (especially where they are unsure if their conduct constitutes an offence) and the evidence being used against them by the public prosecutors.³²⁶ Accordingly, it is suggested that leniency policies and cartel offences should be better aligned and leniency programs should allow for criminal leniency

³²³ Ibid, 321.

³²⁴ Ibid, 330.

³²⁵ L Morphet “Competition Amendment Act – Criminal Sanctions and other Amendments” available at <http://www.polity.org.za/article/competition-amendment-act-criminal-sanctions-and-other-amendments-2010-01-19> accessed on 14 October 2012.

³²⁶ Ibid.

and provide clarity as to when a director or managing officer will qualify for immunity from criminal prosecution.

It is arguable that criminal sanctions work well in developed countries because the judiciary has the willingness and ability to enforce them. The judiciary in a developing country is usually under resourced and faces a back-log of crimes which may be regarded as more serious in nature.³²⁷ Criminal sanctions may be perceived as being too harsh and disproportionate to the crime. In addition, newly established competition authorities will have a better chance of meeting the threshold of a balance of probabilities than proving a criminal offence beyond reasonable doubt, hence it is argued, that it is surely better to have administrative penalties that will actually be applied than wasting time and resources on trying to meet this higher threshold for a criminal sanction.³²⁸

Another mechanism for deterring cartel activity is, in addition to fines, to impose other penalties, as has been done in Brazil. For example, firms could be excluded from public procurement procedures, trade licences revoked, restrictions placed on tax benefits, negative publicity and restitution orders given. Furthermore individuals who are found to be implicated could be barred from serving as a director or public officer of a company or on the other hand, could receive rewards where they inform the authorities of cartel activity, as has been done in Korea.

Whether a country opts for one of these alternative methods of enforcement will depend on a number of factors such as the relevant competition authority's resources, its enforcement history and success rates and the relationship between the competition authorities, public prosecutors and courts.

³²⁷ T Kunene op cit note 40.

³²⁸ Ibid.

VIII. CONCLUSION

This paper has served to provide an overview of the leniency policies and criminal sanctions that have been adopted in Korea and Brazil. In considering their experiences South Africa can see what has and has not worked in other developing countries and can learn from their experiences.

It is clearly evident from the experiences of Korea, Brazil and South Africa that in order for a developing country to have a successful leniency policy there must be vigorous enforcement to ensure a high risk of detection. There must be strong penalties attached to violations to incentivise members to self-report, in other words the cost of getting caught must outweigh the value of the cartel. These factors will create a race to be 'first to the door'.

The leniency policy and the ensuing processes should be clear and transparent so that applicants can be aware of the risks and benefits which they face and can predict whether they will be able to obtain leniency, how they will be treated and the likely consequences. It is also important that a high level of trust be cultivated with regard to concerns of confidentiality and protection.

It is apparent that co-operation with developed countries can play an important role in detecting cartels and it is submitted that South Africa should endeavour to work more closely and consistently with other jurisdictions.

In particular South Africa should consider the possibility of offering a set discount penalty to the second firm which furnishes the Commission with new evidence so that the Commission can better investigate the cartel and bring its activities to an end. This would appear to be a reasonable measure to implement given that the Commission is more concerned with preventing cartelisation than penalising participants.

Another factor which requires further debate is the extent to which immunity will be granted. This is especially so given that a firm will not receive immunity in respect of other contraventions under the Act and that third parties may still bring a claim against the firm for harm it suffers arising from the prohibited practice. In a similar way, the criminal sanction as provided for in section 73A undercuts the CLP to some extent.

As has been illustrated by the experiences of Korea, Brazil and South Africa, enforcement of criminal sanctions can be very difficult. Enforcement of the criminal sanction lies predominantly in the hands of the public prosecutors who have neither the time, resources nor the skills to effectively pursue competition matters, let alone complex cartel activities. In order for criminal sanctions to be of any value it is pertinent that the role and functions of the public prosecutors and competition authorities must be clearly defined and they should undertake to co-operate and in so far as it is possible to run joint or parallel proceedings. If this cannot be achieved it is submitted that it would be preferable for criminal enforcement in competition matters to be dealt with by the competition authorities.

Moreover, the provisions of section 73A need to be further clarified so as to remove any uncertainty as to the meaning of the section or as to how it should be applied. Addressing these issues will also remove any questions as to the constitutionality of the section.

Whilst the inclusion of a criminal sanction is controversial, there are certainly advantages to it, most importantly the fact that it has the effect of increasing self-reporting and encouraging cartel members to apply for leniency. In order to be more effective the problematic aspects of criminal sanctions will have to be resolved by each country having regard to its legal procedures, economy, culture and history. Where a developing country makes provision for these difficulties and addresses them taking into account their own systems and cultures and not by merely importing the law of foreign jurisdictions this will no doubt benefit competition law enforcement in the long run.

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